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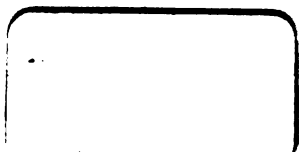
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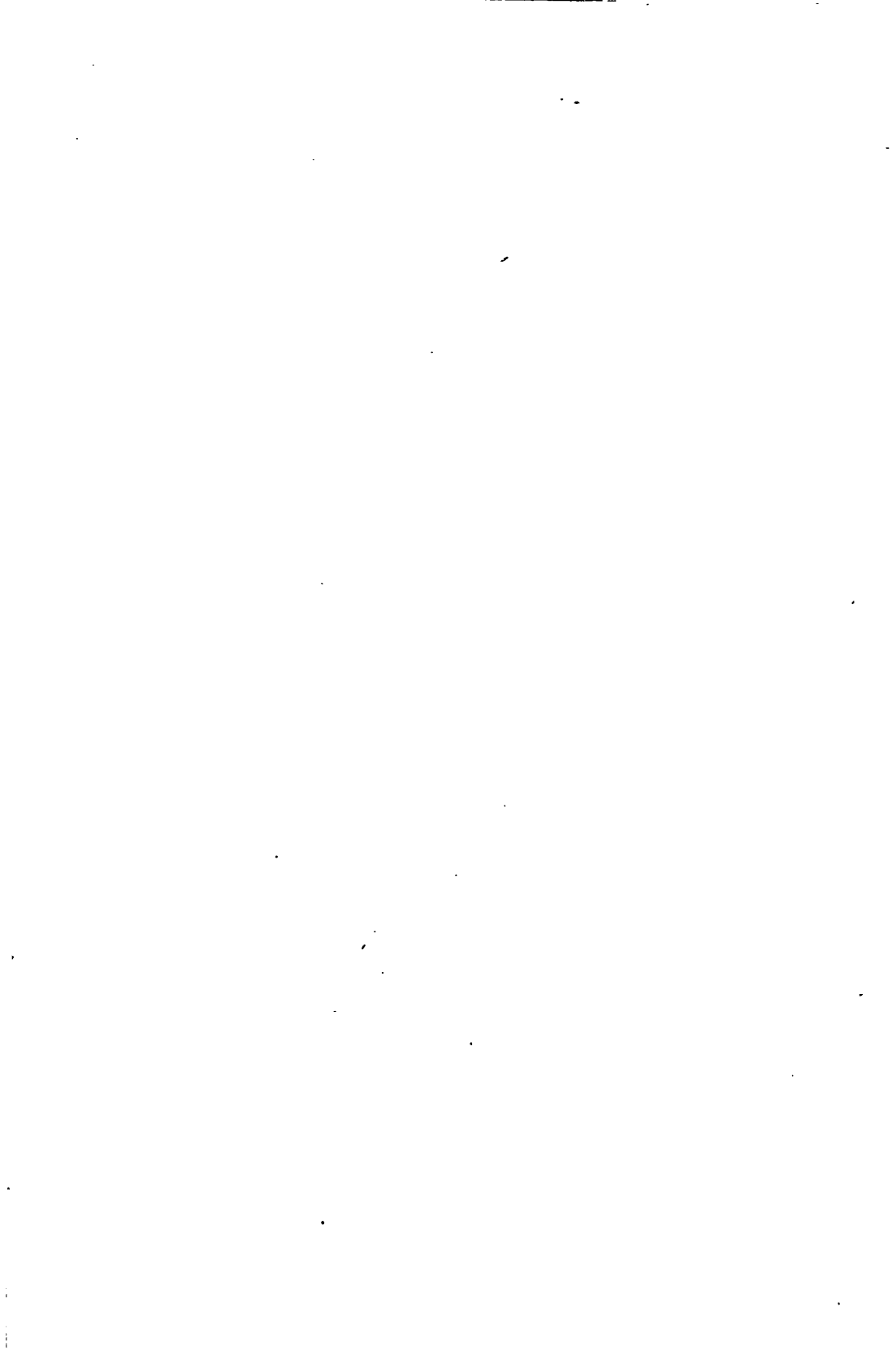


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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA

JANUARY and MAY TERMS, 1915

BY
U. G. WHITNEY
REPORTER

VOLUME 170

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By
STATE OF IOWA.

MAY 18 1916

JUDGES OF THE SUPREME COURT.

HORACE E. DEEMER, *Chief Justice*, Montgomery County.

SCOTT M. LADD, O'Brien County.

SILAS M. WEAVER, Hardin County.

WILLIAM D. EVANS, Franklin County.

FRANK R. GAYNOR, Plymouth County.

BYRON W. PRESTON, Mahaska County.

BENJAMIN I. SALINGER, Carroll County.

OFFICERS OF THE COURT.

GEORGE COSSON, *Attorney General*, Audubon County.

B. W. GARRETT, *Clerk*, Decatur County.

U. G. WHITNEY, *Reporter*, Woodbury County.

JUDGES OF THE COURTS

during the time of these reports, from which appeals may be taken to the Supreme Court.

(NAMES ARRANGED IN ORDER OF SENIORITY OF SERVICE.)

DISTRICT COURTS.

- First District*, two judges—HENRY BANK, JR., Keokuk; WILLIAM S. HAMILTON, Ft. Madison.
- Second District*, four judges—* F. W. EICHELBERGER, Bloomfield; C. W. VERMILION, Centerville; D. M. ANDERSON, Albia; F. M. HUNTER, Ottumwa; SENECA CORNELL, Ottumwa.
- Third District*, two judges—HIRAM K. EVANS, Corydon; THOMAS L. MAXWELL, Creston.
- Fourth District*, three judges—† JOHN F. OLIVER, Osawa; † DAVID MOULD, Sioux City; GEORGE JEPSON, Sioux City; JOHN W. ANDERSON, Osawa (1915); W. G. SEARS, Sioux City (1915).
- Fifth District*, three judges—J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY (1911), Perry; LORIN N. HAYS (1911), Knoxville.
- Sixth District*, three judges—K. E. WILLCOCKSON, Sigourney; JOHN F. TALBOTT, Brooklyn; HENRY SILWOLD, Newton.
- Seventh District*, three judges—A. J. HOUSE, Maquoketa; ARTHUR P. BARKER, Clinton; WILLIAM THEOPHILUS, Davenport; MAURICE DONEGAN, Davenport; F. D. LETTS, Davenport; † LAWRENCE J. HORAN, Muscatine.
- Eighth District*, one judge—RALPH P. HOWELL, Iowa City.
- Ninth District*, five judges—† HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; LAWRENCE DE GRAFF, Des Moines; CHARLES A. DUDLEY, Des Moines; WM. S. AYERS, Des Moines; HERBERT UTTERBACK, Des Moines.
- Tenth District*, three judges—† FRANKLIN C. PLATT, Waterloo; GEORGE W. DUNHAM, Manchester; CHAS. W. MULLAN, Waterloo; H. B. BOIES, Waterloo.
- Eleventh District*, three judges—R. M. WRIGHT, Ft. Dodge; † C. G. LEE, Ames; † C. E. ALBROOK, Eldora; H. E. FRY, Boone (1915); EDWARD M. MCCALL, Nevada (1915).
- Twelfth District*, three judges—C. H. KELLEY, Charles City; J. J. CLARK, Mason City; M. F. EDWARDS, Parkersburg.
- Thirteenth District*, two judges—A. N. HOBSON, West Union; WILLIAM F. SPRINGER, New Hampton.
- Fourteenth District*, two judges—D. F. COYLE, Humboldt; N. J. LEE, Estherville.
- Fifteenth District*, five judges—A. B. THORNELL, Sidney; ORVILLE D. WHEELER, Council Bluffs; EUGENE B. WOODRUFF, Glenwood; THOMAS ARTHUR, Logan; JOSEPH B. ROCKAFELLOW, Atlantic.
- Sixteenth District*, two judges—† FRANK M. POWERS, Carroll; M. E. HUTCHISON, Lake City; E. G. ALBERT, Jefferson.
- Seventeenth District*, two judges—B. F. CUMMINGS, Marshalltown; JAMES W. WILLETT, Tama.
- Eighteenth District*, three judges—F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids; JOHN T. MOFFIT, Tipton.
- Nineteenth District*, two judges—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*, two judges—JAMES D. SMYTH, Burlington; OSCAR HALE, Wapello.
- Twenty-first District*, two judges—WILLIAM HUTCHINSON, Alton; W. D. BOIES, Sheldon.

SUPERIOR COURTS.

- Oedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—FRANK J. CAPELL.
- Grinnell*—PAUL G. NORRIS.
- Keokuk*—W. I. MCNAMARA.
- Oelwein*—JOHN R. BANE.
- Perry*—W. W. CARDELL.
- Shenandoah*—GEO. H. CASTLE.

* Died, Oct. 11, 1914.

† Retired, Dec. 31, 1914.

‡ Resigned, April 27, 1914.

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REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF THE
STATE OF IOWA
AT
DES MOINES, JANUARY AND MAY, 1915, TERMS,
AND IN THE SIXTY-NINTH YEAR OF THE STATE.

A. E. JONES, Appellant, v. F. E. PETERSON et al., Appellees.

REPLEVIN: Right to Possession—Necessity for Payment or Ten-

- 1 der. In order to maintain an action of replevin, plaintiff must be entitled to the immediate possession of the property. If payment or tender is necessary in order to fix such right, then payment or tender of the correct amount must be made, even though defendant is demanding more than he is entitled to receive.

PRINCIPLE APPLIED: Defendant, as per contract, shipped goods to plaintiff. The sum of \$230.00 was due defendant for the property, less \$78.25 for freight and demurrage thereon (which freight defendant had agreed to pay) and less \$12.00 for shortage in articles sent, or \$139.75. Defendant demanded \$200.00, evidenced by a sight draft attached to the bill of lading. Plaintiff brought replevin without tendering the correct amount. He made no tender at all, either to defendant for the amount due him or to the railway company for amount due as freight.

Months afterward, he deposited the \$230.00 in court, asking the court to protect him as to the shortage and as to freight, which the court did, but charged him with interest on the true amount due defendant. *Held* proper, inasmuch as he was not entitled to possession when his replevin action was brought.

Appeal from Boone District Court.—HON. C. G. LEE, Judge.

THURSDAY, APRIL 8, 1915.

ACTION in replevin. Judgment for defendant. Plaintiff appeals. The opinion states the material facts.—*Affirmed*.

C. J. Eller and F. W. Ganoë, for appellant.

Goodykoontz & Mahoney, for appellees.

WEAVER, J.—The parties entered into an agreement for the sale or exchange of certain items of property as follows:

The plaintiff was to receive from the defendant certain second hand machinery, to be shipped to Boone, Iowa, from Galva, Illinois, in return for which defendant was to receive from plaintiff certain other machinery, to be shipped to Galva from Stratford, Iowa, and the sum of \$290 in money. A written memorandum of this agreement, intended to be in duplicate, was prepared, each party signing one copy and delivering it to the other. As the papers appear in evidence, they differ in that Jones' copy alone contains a clause requiring Peterson to pay the freight on the shipment to Boone, and Peterson's copy alone requires Jones to make the shipment from Stratford "on one car." It is conceded that plaintiff then and there paid \$60 to be applied on the cash difference on the exchange, leaving an unpaid remainder of \$230. Plaintiff shipped the machinery to defendant from Stratford on two cars. Defendant shipped the machinery which he was to give in exchange to the plaintiff at Boone, but accompanied the bill of lading with a sight draft for \$200. He did not deny that he was to pay the freight on both shipments, but

1. REPLEVIN:
right to pos-
session: neces-
sity for pay-
ment or
tender.

complained that, by loading the shipment to Galva on two cars instead of one, plaintiff had made him an extra expense which he must make good. This resulted in some contentious correspondence, defendant insisting that plaintiff pay the draft for \$200 and that, if this was found to be an overpayment, defendant would refund the excess. During the time of this correspondence, the shipment to Boone remained in the possession of the carrier, the Chicago & Northwestern Railway Company. The situation thus developed was briefly this: plaintiff, claiming that the draft was in excess of what he owed, refused to pay it except on what he believed to be the proper reduction; defendant would credit plaintiff with no more than the freight charges to Boone less the amount of excess freight which he had paid on the other shipment because it had been loaded on two cars instead of one; and the carrier, indifferent concerning the quarrel between consignor and consignee, held the machinery awaiting the payment of its freight charges. Such being the status of affairs, this action was brought for the possession of the machinery, both Peterson and the railway company being named as defendants. The petition filed set up the written contract, alleged plaintiff's performance thereof and his unqualified ownership of the property. A writ of replevin was thereupon issued and served by taking possession of the property and delivering it to plaintiff. Some months later, plaintiff amended his petition, alleging that he had not paid the remaining \$230 of the agreed money consideration but had orally tendered the same. He failed to allege that the tender had been kept good, and no money was in fact paid or deposited in court for that purpose. Still later, he filed a substituted petition restating the contract and his allegation of performance, alleged that by reason thereof he became entitled to a delivery of the property, freight paid, upon payment by him of \$230; that he had made due tender of such payment to defendant's agent holding the defendant's draft for collection, and had demanded the delivery of the bill of lading and that the tender had

been kept good. With the filing of this substituted pleading, plaintiff for the first time presented and deposited in court the said sum of \$230, and asked that before the money was delivered to defendant the court should make proper application of so much thereof as might be necessary to pay the freight charges to the carrier and costs. There were other allegations as to an alleged shortage of parts of the machinery shipped to him, concerning which items there is now no dispute. The defendant Peterson denied that plaintiff had performed the contract on his part, denied the alleged tender and set up his claim for the claimed excess of freight on the shipment sent to Galva. Upon the issues joined, a jury was waived and trial had to the court.

The parties having rested their case and the court having announced its finding that plaintiff had not shown himself entitled to the possession of the property when the action was commenced and therefore could not recover in replevin, defendant Peterson moved the court to assess the value of defendant's interest in the property and that a money judgment therefor be entered. The motion being sustained, the court found that the interest of the defendant was the amount remaining due upon the agreed money payment, \$230, less a deduction of \$12 for missing parts of the machinery and less the sum of \$78.25 required to discharge the lien of the carrier for freight and demurrage. Judgment for the remainder, \$139.25 with interest, was entered in defendant's favor, and the plaintiff appeals.

It is not easy to understand the purpose for which this appeal is prosecuted. Appellant was given by the court below the benefit of every credit claimed by him, and the only possible benefit he could obtain by a reversal would be the avoidance of a trifling amount of interest and the costs taxed against him. The ruling against plaintiff which resulted in charging him with these items was grounded upon the theory that, at the time he began his action, plaintiff was not entitled to the possession of the property—a conclusion which was inevitable

under the admitted facts. This is so for the very sufficient reason that, when the action was instituted, the possession of the property was rightfully in the railway company until its freight charges were satisfied. Moreover, even as between plaintiff and Peterson, while the latter was setting up an unfounded claim for damages and was demanding more from plaintiff than was due him, yet plaintiff failed to put him in the wrong as to the possession of the property by tendering him what was admittedly his due, until long after the action was begun. The rights of the parties as they stood when suit was brought and the property taken under the writ are determinative of the action for possession. The judgment of the trial court was clearly correct and it is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

THE MAJESTIC COMPANY, Plaintiff, Appellee, v. IRA D. DAVIS COMPANY and CHASE & WEST et al., Defendants, Appellees, MYRTLE GANT et al., Interveners, Appellants.

JUDGMENT: Adjudication—Failure to Plead—Insufficient Basis.

- 1 An adjudication of a controversy cannot be predicated on a ruling on demurrer not made of record and not pleaded.

PLEADING: Answer Containing General Denial—Demurrer. A de-

- 2 murrer will not lie to an answer containing a general denial.

ATTACHMENT: Labor Claims—Enforcement—Custodia Legis—Re-

- 3 lease of Attached Property—Effect. The preferred rights of labor claimants under Secs. 4019, 4020, Code Sup., 1913, do not become fixed upon the mere levy of an attachment on the property. Such claimants must take such steps as will keep the property in the custody of the law. The law provides for the release of attached property on the demand of third persons. To guard against this latter danger, it may be necessary for the labor claimants to secure the appointment of a receiver.

PRINCIPLE APPLIED: An attachment was levied on certain property. A third party claimed the property and served notice on the attaching officer and demanded the release of the prop-

erty. The plaintiff in attachment directed the officer to release the property to said third party. The officer did so, but just how soon was not shown. There was no collusion between the plaintiff and the third party. On the day that the third party made his demand, certain claimants to whom claims for labor were due intervened, set up their claims, and asked that they be established as liens on the property with a preference over all other claims, including the claim of said third party, and that a receiver be appointed. The prayer for a receiver was not pressed to a hearing and none was appointed. After the property was released to the said third party, the labor claimants, by proper notice, made the said third party a party defendant. *Held*, the release of the property deprived the court of any power to enforce the claims for labor on the property.

Appeal from Polk District Court.—HON. CHARLES A. DUDLEY,
Judge.

THURSDAY, APRIL 8, 1915.

APPELLANTS filed labor claims and intervened in a landlord's attachment suit entitled *The Majestic Company vs. Ira D. Davis Company et al.* Their claims were denied, and they appeal.—*Affirmed.*

Chester J. Eller and C. N. Pickler, for appellants.

Henry & Henry, for appellee, Chase & West.

PRESTON, J.—The petition for landlord's attachment, filed August 16, 1913, is in the ordinary form, and states that in November, 1911, they leased the Majestic hotel building to the defendants, Ira D. Davis Company and Ira D. Davis, who took possession of the property on October 1, 1912, under the above lease; that there was \$2,070.00 due, for which plaintiff asked judgment, with interest, and that a writ of attachment issue for the enforcement of its lien.

The contest is between the labor claimants and Chase & West. Chase & West came into the case by answer to the petition of intervention of such claimants. About December 24, 1912, Chase & West, by a written lease, sold to Ira D.

Davis Company furniture and other property. The lease provides: That the said Chase & West do sell and lease unto Ira D. Davis Company the property described, and contains the further provision:

“ . . . And the said party of the second part, in consideration of the leasing of said property, agrees to pay said party of the first part at its place of business in Des Moines, Iowa, as rent for said property, the sum of \$. as follows: \$. upon the signing of this lease, receipt of which is hereby acknowledged, and \$25.00 each week, at 8%, until paid. . . . It is further expressly agreed that the title and ownership of all property is in and shall remain in said Chase & West, Incorporated, until all of said rentals and interests, damages and costs, are fully paid.”

The lease was recorded in the Chattel Mortgage Record of Polk County. There seem to have been two such sales and leases, but the property therein described is substantially all the property levied upon by the sheriff, as hereinafter stated, and is the property which was released by the sheriff. On August 16th a writ of attachment was issued, and the sheriff levied upon the property described in the Chase & West leases, and a small amount of property in addition thereto.

On August 19, 1913, the appellants, ten in number, having claims amounting to about \$245.00, filed claims with the clerk of the district court. As a part of each claim, and attached thereto, was a motion asking the court for an order establishing the claim as a preferred claim and directing its payment as such, as provided by the statute, and to establish a lien against the property levied upon by the attachment either as the property of Ira D. Davis Company or Chase & West, as provided by Sec. 4020 of the Code.

On the same day, August 19, 1913, the claimants, as interveners, filed their petition of intervention, showing the filing of their claims under Sec. 4019 of the Code, alleging that their claims are prior and superior to the claims of Chase &

West and prior to the landlord's lien, and asking that their liens be established against all the property attached, also stating that, for the protection of their interests, it is necessary that a receiver be appointed to take charge of said assets until the further orders of the court. They ask that their claims be established and that a receiver be appointed.

On August 19, 1913, the appellee, Chase & West, filed with the sheriff a notice, to which was attached a list of the property sold by Chase & West to the Davis Company under and by virtue of the lease, and claiming to be the owner of the property. The notice demanded the immediate release and surrender of the property. Later, the property was released by the sheriff to Chase & West at the direction of plaintiff's attorney. We do not find it stated in the record how many days after this notice was served the property was released, but we assume that it was done within a short time.

On October 6, 1913, the labor claimants caused an original notice to be served upon Chase & West of their petition of intervention. October 10th, interveners filed an amendment to their petition of intervention, stating that Chase & West claimed a lien on a part of the property, furniture and fixtures attached by reason of a written contract, and alleging that if Chase & West have a lien, the same is inferior to the interveners' labor claims.

November 4th, Chase & West filed an answer to the intervention, in which it is stated that it disclaims any interest in this suit or in the property; denies all allegations of the intervention and amendments; denies that it claims a lien on any part of the property; avers that under the writ of attachment certain personal property owned by it was attached by the sheriff; that it served its notice of ownership, and the property was, by direction of the plaintiff, released by the sheriff from said writ of attachment and delivered to it. It asked to be dismissed from the case, with a judgment against all the interveners.

December 31st, the interveners demurred to said answer on the ground that the contract between Chase & West and

the Davis Company was a lease in the form of a conditional sale, and a reservation as to title was for the purpose of securing payment to Chase & West and, therefore, no more than a chattel mortgage; that the sheriff cannot release property from a writ of attachment and defeat labor claimants of their liens as given by statute; that the claimants' lien became fixed upon the levy of the attachment; and that no acts of the sheriff or Chase & West can relieve it from liability.

On application of the interveners, the court set the hearing of the motions to establish the labor claims for January 3, 1914. At that time, arguments were had upon the motions and the demurrer. Interveners were given permission to introduce evidence in support of their motions, and evidence was so introduced. The evidence was sufficient to establish the claims, and the trial court so found; but the court held, substantially, that the claimants were not entitled to a lien because the property had been released. There was a small amount of property levied upon which was not released, but was sold for about \$60.00, and, after payment of costs in the sum of \$20.00, the balance was ordered by the court to be prorated among the labor claimants. The ruling on the demurrer and the determination of the motions appear to have been made at the same time, although it is claimed in argument that the court had intimated before the evidence was introduced that it would overrule interveners' demurrer to the answer. Appellants have appealed from the ruling on the demurrer and the refusal to establish the interveners' liens on the property.

The appellees' propositions are:

1. That the labor claimants, by their petition of intervention, asserted the same rights which were set up in their motions; that the court, in overruling their demurrer to the answer of Chase & West, passed upon the merits of the controversy between the labor claimants and Chase & West; and that the labor claimants could not, therefore, be heard to assert the same proposition upon their motions.

1. JUDGMENT:
adjudication:
failure to
plead: insuffi-
cient basis.

2. That the property was released by plaintiff in the attachment suit and surrendered to Chase & West by the sheriff; that the court thereafter had no jurisdiction over it; that the statute relied upon by the labor claimants does not give a lien against property, but a preference in the distribution of funds realized from the sale of property upon any process of court; that the labor claimants acquired no lien against the property in question; that the plaintiff, in the attachment suit, acquired a lien by the levy under his attachment, but that ceased when the property was released by the plaintiff from the attachment.

Appellees, however, state their claim in another way, and more concisely, as follows: The labor claimants now assert that, under the provisions of Secs. 4019 and 4020 of the Code, they should be given a lien in this proceeding upon said property to the amount of their several labor claims, and that a receiver should be appointed to take possession of said property and enforce the alleged lien of the labor claimants. This is the question involved in this appeal, plainly and accurately stated.

No authorities, other than the statute, are cited in support of the proposition. The notice to the sheriff by Chase & West to release the property was given under Secs. 3906 and 3991 of the Code.

1. As to the first proposition of plaintiff, the argument is that the ruling on the demurrer of interveners was an adjudication. Doubtless the court considered that a determination of that question determined the question, also, that interveners were not entitled to have their claims established, or rather, liens therefor established against the property. But no record had been made of the ruling on the demurrer, and no adjudication was pleaded. Furthermore, the answer of

defendants contained a general denial, and for this reason alone the demurrer was properly overruled. The denial was of the matters set up by interveners in their petition of intervention and left the matter as to interveners' right to

2. PLEADING :
answer containing
general denial:
demurrer.

the establishment of their liens for determination, as well as the motions. Evidence was, in fact, introduced on the issues so raised, without objection on the part of the appellee. Still further, the appeal is from both the ruling on the demurrer and the denial of the motions, and the relief asked in the petition of intervention.

2. The important question in the case is whether, under the circumstances shown, the labor claimants are entitled to have their claims established as liens upon the property which was seized by the sheriff and later released because of the failure of plaintiff to indemnify the sheriff
3. ATTACHMENT:
labor claims:
enforcement:
custodia legis:
release of at-
tached prop-
erty: effect.

Appellant cites *Wright v. Barnard*, 89 Iowa 166, *Singer Machine Co. v. Holcomb*, 40 Iowa 33, *Budlong v. Cottrell*, 64 Iowa 234, as holding that the lease in question is a conditional bill of sale, and *Reynolds v. Black*, 91 Iowa 1, and *Anundsen v. Printing Co.*, 129 Iowa 200, as holding that labor claims are prior and superior to such liens or chattel mortgages placed of record before the labor claims were made or services rendered. We do not understand appellee to deny these legal propositions.

It is the contention of appellants that, under Sec. 4019 of the Code, a labor claimant has a lien on the property itself; and that it becomes fixed by operation of law as soon as the property is seized as contemplated by the statute; and that Chase & West, the seller of the property under a conditional bill of sale, may not, by notice to the sheriff, cause the property to be released and thereby defeat the court from enforcing labor claimants' liens; and that the claimant's lien is prior to the lien or claim of Chase & West. The appellants contend that Chase & West, by their lease, had only a lien as security for the purchase money of the property. It does not appear that Chase & West had any other claim upon the property, but they served notice on the sheriff that they were the owners of the property. The sheriff was not called upon to determine the legal effect of the lease, whether it was in effect a chattel

mortgage, or whether Chase & West were owners thereunder. The levy of the writ of attachment would give Chase & West a lien upon the property, but that was released when plaintiff's attorneys directed the sheriff to release the property after the notice of ownership had been served. And when afterwards they filed an answer to the petition of intervention of appellants, they did not claim any lien.

The statute provides that when the property of any company, corporation, firm or person shall be seized upon by any process of any court, or placed in the hands of a receiver, trustee or assignee, or their property shall be seized by the action of creditors, for the purpose of paying or securing the payment of the debts of such company, corporation, firm or person, the debts owing to employees for labor performed within the ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, shall be a preferred debt and paid in full, etc. The statute is not exactly the same as it was when some of our decisions were made. Several of our cases refer to labor claims as liens, but the question has generally arisen when the property had been sold, and the controversy was then as to priority between labor claimants and others having liens on the property. We are cited to no case in this jurisdiction or any other holding definitely that such claims are liens upon the property itself. It is not claimed, and doubtless could not be, that laborers have a lien on the property itself before it is seized and in the custody of the law. The writer is of the opinion that, when property has been seized and is once in the custody of the law, labor claims such as these are liens upon the property itself, and that, had claimants pressed their claim for the appointment of a receiver, and had one appointed before the sheriff released the property, so that it could be said the property was in the custody of the court, they would have been entitled to have the property sold to satisfy their claims; and I think, under such circumstances, their labor claims are liens, and that such was

the purpose and intent of the legislature; and I think the same would be true after a seizure by the sheriff if no notice of ownership had been served, or if the sheriff had taken the responsibility of holding the property after notice without requiring a bond. If a receiver had been appointed, or if no notice had been served, the sheriff would have been protected.

There is no claim in this case of any collusion between plaintiff and Chase & West. But suppose plaintiff's claim for a landlord's lien had been for only \$100.00, and the claim of Chase & West \$2,000.00. The labor claims amount to \$250.00. Under such circumstances, Chase & West could pay off plaintiff's claim for rent and plaintiff could dismiss the case so that there would be no sale of the property and no preference in the proceeds in favor of the claimants. Other conditions might arise so that in many cases the very purpose of the law might be defeated.

The statute in Illinois is much like ours and provides that debts for labor against a person whose business shall be suspended by creditors shall be preferred claims and first paid in full. In *Heckman v. Tammen et al.*, 184 Ill. 144, 56 N. E. 361, it was said that the only questions important to be considered are whether or not the appellees belong to the class of persons whose claims are to be treated as preferred, under the statute, and, if it be conceded or held that appellees, as such claimants, are entitled to a preference in payment, whether or not they are entitled to such preference over the claim or demand of appellant secured by a chattel mortgage. The court did say:

"The effect of the act is to create in favor of laborers and servants a statutory lien upon chattel property superior to the claims of other creditors in cases coming within the provisions of the statute. This is manifest from the language of the act. We must ascertain the intention of the legislature from the language used, and we cannot interpolate exceptions

or qualifications where none can be implied from a consideration of the entire act, or from it and other acts in *pari materia*. This legislation is remedial and should be liberally construed. In most cases such laborers have no available means to make secure their demands for labor. Such demands are usually small and payable at short intervals, and it is but the enactment of the simplest natural justice into law that when the chattel property used in the business is seized by creditors and the business is thereby suspended, such property should be held for the payment of such labor demands before other creditors are paid. Almost from time immemorial similar protection has been awarded to seamen."

It cannot be said, perhaps, that this case actually decides the point now under consideration, yet to my mind the reasoning is sound. In that case, *Reynolds v. Black*, 91 Iowa 1, is cited as sustaining the conclusion reached. As an original proposition, I should have some doubt whether in all cases labor claims should be held to be superior to an existing chattel mortgage. *McDaniel v. Osborn*, 2 L. R. A. (N. S.) 615, and Note. It seems to have been held by this court that such claims are prior and superior to such a chattel mortgage. *Reynolds v. Black*, *supra*; *Anundsen v. Printing Co.*, 129 Iowa 200; *Snyder v. Carson*, 155 Iowa 552, 557.

But that question is not in this case, unless it be held that under the circumstances the appellants' claims were liens upon the property. But it is perhaps unnecessary to determine the point whether claimants would have had a lien on the property had no notice of ownership been served on the sheriff, or if, after such notice, a bond had been given, or if plaintiffs had presented their petition for a receiver to the court and had a receiver appointed; because notice was served, no bond was given, and claimants did not present their application for a receiver to the court and have a receiver appointed before the sheriff released the property. Had there been a sale of the property, there would, of course, be no question

as to claimants' right to participate in the distribution of the proceeds. In that case, the priority of the claims of the different parties could have been determined, and in that case, if the question had been litigated, it could have been determined whether Chase & West had only a lien under their lease or whether they were owners of the property.

Though the claims of appellants and their petitions of intervention were filed before the sheriff released the property, he was not a party to the action and was not required to take notice of the interventions or the claims. It is possible, though we do not determine the point, that claimants could have served notice on the sheriff of the filing of their claims and their petition for a receiver before the property was released, and the sheriff, under Sec. 3925 of the Code, make application to the court for directions. That section provides: "The court may from time to time make and enforce proper orders respecting the property, sales and application of the money collected." This was attempted in *Wells v. Kelley*, 121 Iowa 577. In that case, the notice on Kelley was held not to be sufficient because he was not at the time acting as an officer, but was only an agent foreclosing a chattel mortgage by notice and sale. The sheriff was bound to levy upon property as directed by plaintiff.

Persons claiming to own the property had a right to serve notice of ownership, and when that was done the sheriff could release unless a bond was given.

The sheriff was not compelled at his peril to hold the property unless the bond was given. In a sense, this property was seized when the levy was made, but it was subject to notice of ownership by others and subject to be released if the bond was not forthcoming. Under the circumstances shown in this case, we think it cannot be said that the property was in the custody of the law until the bond was given or a receiver appointed.

In *Wells v. Kelley*, *supra*, force was given to the fact that property was not in the custody of the law in determining

that labor claimants were not entitled to participate in the distribution of money received on the foreclosure of a chattel mortgage. At the time of the decision in that case, Sec. 4019 of the statute did not contain one clause that was in the statute prior thereto and which is similar to the present statute. In that case, referring to Sec. 4019 of the Code as it then stood, the court said that the statute "in a word, provides that the property of a corporation, etc., held in *custodia legis*, through the medium of some process of court, or by a receiver, trustee or assignee, shall be subject to labor liens. It does not refer, in terms or by necessary implication, to the disposition of property otherwise than by an officer, and pursuant to an order of court, or under the process of a court."

And in the same case it is said that the purpose of the legislature in omitting from the statute the clause, "or when their business shall be suspended by the action of creditors," etc., was "to confine the operation of the statute to those cases where the taking of the property, or the disposition thereof, was by virtue of some process or order of court. Now in this case no court had jurisdiction of the mortgage foreclosure, and no officer of court was in possession or had control of the property."

The cases are reviewed in *Anundsen v. Printing Co.*, 129 Iowa 200. In that case, a part only of the property of the debtor was seized, and a part of it was fraudulently shipped out of the state, and it was held that as to the property still in the custody of the law, it was liable for labor claims.

Snyder v. Carson, 155 Iowa 552, was a contest between a landlord and one who had purchased at foreclosure sale of the chattel property after it was seized under the writ of attachment, but in that case the attachment had not been released, but the property, or its proceeds, was still in the custody of the court. The labor claims were ordered paid first.

Our conclusion is that, under the circumstances of this

case, for the reasons given, the judgment of the trial court was right, and it is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS and LADD, JJ., concur in the conclusion reached.

PORTER MORROW, Appellee, v. JOHN BELL, Appellant.

JUSTICE OF THE PEACE: Appeal—Amount in Controversy—How

- 1 **Determined.** An appeal from the judgment of a justice of the peace does not lie unless the amount in controversy exceeds \$25.00 (Sec. 4547, Code, 1897). To determine this amount it is not permissible to add together the amount claimed by plaintiff and the amount claimed by defendant as a counterclaim.

Appeal from Harrison District Court.—HON. E. B. WOODRUFF, Judge.

THURSDAY, APRIL 8, 1915.

APPEAL from the ruling of the district court dismissing defendant's appeal.—*Affirmed*.

Cochran & Barrett, for appellants.

L. W. Fallon, for appellee.

PRESTON, J.—The suit was brought in justice court. Plaintiff's petition claimed \$20.00, which was denied by the answer, and defendant claimed \$6.50 on a counterclaim, which was denied by plaintiff. Judgment was rendered by the justice for \$20.00 against the defendant, and defendant appealed to the district court. Plaintiff filed a motion to dismiss the appeal on the ground that the amount in controversy was less than \$25.00, and the motion was sustained. The trial court allowed a certificate of appeal to this court.

The argument for appellant is that Sec. 4547 of the Code provides, in reference to appeal from justice court, that no such appeal shall be allowed when the amount in controversy

does not exceed \$25.00. And appellant says that this section has been construed by the Supreme Court as meaning the amount in controversy as claimed by the pleadings, using the plural and thereby referring to the petition and answer. They cite: *Nichols v. Wood*, 66 Iowa 225; *Lundak v. Railway*, 65 Iowa 473; *Perry v. Conger & Norris*, 65 Iowa 588.

They argue that the amount in controversy, therefore, as shown by these pleadings, would be \$20.00 plus \$6.50, or \$26.50, and that, upon this theory, the motion to dismiss should have been overruled.

The point decided in the cases cited is that the amount in controversy should be determined from pleadings in the case, and not from the judgment rendered by the justice. In the last case, the plaintiff's claim was for \$100.00 damages, but on the trial, plaintiff recovered judgment for five cents damages, and the costs, which were taxed at \$27.00. The trial court dismissed the appeal on the ground that the amount in controversy was less than \$25.00. The plaintiff had claimed \$100.00, and on appeal was entitled to retrial of the questions involved, and it was held that, if plaintiff could establish the whole amount of his claim, he would be entitled to judgment for that amount. The amount in controversy must be determined by the pleadings. Ordinarily this is determined by the amount claimed by plaintiff in his petition.

It is stated in Cyc. that, broadly, the amount involved in controversy is the highest sum, according to the statutory limitation, for which judgment can be rendered. 2 Cyc. 555.

It is also said, at page 558, same volume of Cyc., that it is not always the sum demanded or claimed which controls, but that which is actually in controversy between the parties as the case stands in the appellate court, to ascertain which the appellate court may look into the entire record; or, as otherwise stated, the amount is determined by the case as it stands in the appellate court rather than by the amount in controversy in the lower court. As bearing somewhat upon this, see also *Pierce v. Wade*, 100 U. S. 444, 25 L. Ed. 735.

The fact that a counterclaim is filed has a bearing. While it is true, in a sense, as claimed by appellant, that plaintiff is demanding \$20.00 and the defendant \$6.50, and that this entire matter is in controversy, yet the largest judgment that could possibly be rendered would be \$20.00, and that would be in case the plaintiff succeeded and the defendant was unsuccessful. If both established their claim, the amount would be \$13.50, because the recovery by defendant on his counterclaim would necessarily have to be offset against the plaintiff's recovery.

But, after all, we think the question is ruled by our Iowa cases. The precise point presented has not been determined. But Sec. 4110 of the Code, in regard to appeals to the Supreme Court, provides that no appeal shall be taken in any case in which the amount in controversy between the parties, as shown by the pleadings, does not exceed \$100.00, etc. This statute uses the words "as shown by the pleadings," using the plural, just as appellant contends in regard to Sec. 4547 and the cases cited. Under the section referred to, in regard to appeals to the Supreme Court, it has been held that the amounts of the original claim and counterclaim cannot be added together in determining the amount in controversy. *Madison v. Spitsnogle*, 58 Iowa 369; *Fox v. Duncan*, 60 Iowa 321. See also: *Thurston v. Lamb*, 90 Iowa 363; *Central City v. Treat*, 101 Iowa 109.

The judgment of the district court is—*Affirmed*.

DEEMER, C. J., EVANS and SALINGER, JJ., concur.

LOUIS SHELBERG, Appellee, v. W. M. JONES, Appellant.

PLEADING: Relief Asked—Quantum of Proof Required—Fraud and 1 Conspiracy. The quantum of proof required is only such as is necessary to entitle plaintiff to the relief asked. So held where plaintiff pleaded (a) fraudulent representations and (b) conspiracy to defraud, and proved the former only.

TRIAL: Instructions—Ignoring Issues Not Met with Proof—Duty
2 of Court. There is no occasion to instruct on an issue as to which there is no evidence. So held where plaintiff pleaded (a) false representations and (b) conspiracy to defraud, but introduced no evidence of a conspiracy.

TRIAL: Evidence Admissible for Limited Purpose—Necessity for
3 Requested Instruction. When evidence is admissible for certain limited purposes only, he against whom the same is received must request an instruction so limiting or confining the jury in the consideration of such evidence, or the right will be waived.

TRIAL: Verdicts—Form—Several Defendants. In an action against
4 several defendants, *held*, the omission to submit separate forms of verdicts for each defendant could not have been prejudicial.

Appeal from Polk District Court.—HON. CHAS. A. DUDLEY,
Judge.

THURSDAY, APRIL 8, 1915.

ACTION at law to recover damages for alleged fraud in an exchange of lands. Trial to a jury, verdict and judgment for plaintiff, and the defendant Jones appeals.—*Affirmed*.

Chester J. Eller, for appellant.

John Newburn, John McLennan and J. R. Price for appellee.

WEAVER, J.—In his petition, plaintiff alleges that defendants conspired to deceive and defraud him in an exchange of 320 acres of land owned by him in the state of Minnesota for 160 acres of land in Missouri, and that they did in fact fraudulently and falsely represent the Missouri land as being found in the near vicinity of a certain town and having certain desirable improvements, to be all in cultivation and in blue grass pasture except about 50 acres of timber, when in truth and in fact it was located very much farther from town, had no improvements and was in no part cultivated or in blue grass. Plaintiff further states that he relied upon said false representations and was deceived and induced thereby to

make the exchange to his damage in a large sum, for which he asks judgment against all the defendants. The defendants deny all the charges of conspiracy and of false representations on their part. The defendant Jones, to whom the Minnesota land was conveyed, also pleads certain counterclaims; but as they do not figure materially in the appeal, we need not stop to state them specifically. At the close of plaintiff's testimony, the defendants moved for a directed verdict in their favor on the ground that plaintiff's case is grounded upon an alleged conspiracy and that no evidence of a conspiracy had been offered. The court overruled the motion to direct, but announced that the question or charge of conspiracy would not be submitted to the jury, and further held that the general allegations of the petition were broad enough to permit a recovery on the charge of fraud and false representations provided plaintiff should elect to amend the prayer of his petition to specifically ask a recovery on that ground. This the plaintiff consented to do and the trial proceeded to its close. The jury returned a general verdict against all of the defendants for \$2,475, and, in answer to interrogatories, found specifically that each of the defendants, Jones, Price and Knepper, actively participated in the false representations by which the plaintiff had been misled to his injury. Defendants' motion for a new trial was denied and judgment entered on the verdict.

I. The appellant's first and principal argument is directed to the point that, the petition having charged a conspiracy and the trial court having held that no conspiracy had been proved, this was virtually an end of the case; or if the case was to proceed, it was the duty of the court in giving its instructions to specifically inform the jury that there was no evidence of a conspiracy.

1. PLEADING:
relief asked:
quantum of
proof re-
quired: fraud
and con-
spiracy.

To affirm the first proposition would be to place entirely too great stress upon the allegation that defendants conspired together to defraud the plaintiff by false representations. The

actionable wrong, if any, is in the false representations, and not in the combination or conspiracy. If the false representations were made or participated in by the defendants acting together or in aid of one another, and that fact is alleged and proved, then the fact that plaintiff also charged that the wrong against him had been done in pursuance of a previously formed conspiracy and that he had failed to prove it was immaterial, and did not operate to prevent his recovery of a joint judgment against all of the defendants having a hand in the commission of the fraud. A plaintiff is not required to prove more of the matters alleged in his petition than is necessary to constitute a cause of action. If, for example, he charges two or more persons with having wickedly conspired to commit an assault and battery upon him, and that in pursuance of such combination they did without cause beat and bruise him, and upon the trial he proves no more than that they did at a certain time and place wrongfully and unitedly commit an assault and battery upon his person, his right of recovery is perfect, even though he offer no word of testimony of the alleged prior conspiracy. Bearing this rule in mind, we may eliminate from the petition in this case every word thereof in reference to a conspiracy to defraud the plaintiff, and there is still left the clear and distinct allegation of facts, making a sufficient charge of false representations by the defendants upon which plaintiff relied to his injury. If then his proof supports such charge, he is entitled to recover. Even if the conspiracy had been proved, it would have added nothing whatever to the cause of action, though it might have made admissible in evidence certain matters which would not otherwise be competent.

All this we are inclined to think would have been equally true had the petition been allowed to stand in the form in which it was originally filed; but with the amendment made by permission of court, it is not open to doubt. There was no error in denying the motion for a directed verdict.

Nor do we find any error with respect to this feature of

the case in the court's charge to the jury. According to appellant's contention, no evidence was introduced tending

2. TRIAL: In-
structions:
ignoring is-
sues not met
with proof:
duty of court.

to prove a conspiracy. In this the court agreed with him, and announced that the issue upon that allegation would not be submitted to the jury. In framing its charge, the court consistently instructed the jury that for plaintiff to recover it must be found from the evidence that defendants did make the alleged false representations, that they were made with intent to deceive and mislead the plaintiff and did in fact induce and mislead him into the conveyance of the Minnesota land and that he was damaged thereby. It further instructed in substance that, if any of the defendants were shown to have made such false representations to plaintiff's injury, then the defendant making them should be held liable for the resulting damages, and that, if all united or acted together in committing such wrong, then all were liable; and that the burden of proof upon such issues was upon the plaintiff. As no evidence had been admitted upon the subject of conspiracy, there was no occasion for saying anything to the jury on that subject. It is true that in reciting to the jury the substance of the pleadings the court (inadvertently doubtless) referred to the allegations that defendants conspired together, but it would be very unreasonable to assume or hold it possible that such bare recital could prejudicially affect the defense. In each of the instructions which appellant has seen fit to include in his abstract, the attention of the jury was directed solely to the issue whether the alleged false representations were made to the plaintiff's injury, and liability therefor was restricted to the defendants who made them and to those aiding, abetting or uniting in the fraud. The jury were sworn to observe the instructions and to return their verdict upon the evidence alone, and we may presume that they did their duty in this respect. The special findings are to the effect that each individual defendant did take part and assist in defrauding the plaintiff by the alleged

false representations, and such being the case, it is immaterial, as we have before said, whether there was or was not a prior conspiracy to perpetuate the wrong.

II. Objection is made to the sufficiency of the evidence to sustain the verdict. Whether the representations were made as charged was a matter of dispute in the evidence and the verdict of the jury is conclusive upon us. That they were untrue in several very material respects has also strong support in the record. That defendants knew they were untrue, or, having no knowledge of the truth concerning them and no reasonable grounds for believing them to be true, made the statements for the purpose of inducing plaintiff to believe them and make the exchange of lands, are inferences which the jury could properly draw from the proved facts in the case. The verdict cannot, therefore, be set aside for want of evidence to sustain it.

III. The court instructed the jury that, in case it found the plaintiff entitled to recover, the damages in his favor would be the difference between the reasonable market value

3. TRIAL: evidence admissible for limited purpose: necessity for requested instruction.

of the Missouri land as it in fact was at the time of the exchange and the reasonable market value it would have had if it had been as represented. Appellant concedes this to be the correct measure, but says the court erroneously permitted the plaintiff to show the market value

of the Minnesota land. The testimony thus objected to was admissible at least upon some of the issues on the defendant's counterclaims. Being admissible for some purposes and no request being made to restrict its consideration by the jury, it is unnecessary for us to decide whether it was not also competent as tending to show the reasonableness of plaintiff's claim that he was led by defendants to believe the property he was getting in exchange was of substantial if not large value. We have already held that such testimony is admissible. *Vaupel v. Mulhall*, 141 Iowa 365.

IV. Complaint is made because the court required all

requests for instructions to the jury to be made before the arguments were begun. The ruling appears to be in strict accordance with the statute, Chapter 289, Laws of the 35th General Assembly. It may also be added that we are not informed how or in what manner the appellant suffered prejudice therefrom.

Criticism is offered upon the forms of verdict submitted to the jury because separate forms were not prepared as to each individual defendant. This is said to have a tendency

4. TRIAL: ver-
dicts: form:
several de-
fendants.

to mislead the jury into the belief that the verdict must be returned against all defendants or none. Under the instructions given upon the subject of liability, both joint and individual, of the defendants, in case plaintiff was found entitled to a verdict, it would be an impeachment of the intelligence of the jurors to say they could have been confused upon this proposition. In any event, the objection loses its point when we recall that the jury in separate special findings found that each and all of the defendants had united in the wrongful act, and such being the case plaintiff was entitled to what he obtained, a joint judgment against all.

The foregoing discussion covers all the exceptions which we think require extended notice in this opinion. A careful examination of the record with relation to all of the exceptions taken by appellant reveals nothing requiring a reversal of the judgment below, and it is therefore—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. WILLIAM RAND, Appellant.

**INDICTMENT AND INFORMATION: Minutes of Magistrate—Ir-
1 regular Taking—Motion to Quash.** When an indictment is returned on minutes of testimony certified by the committing magistrate, such indictment is not rendered invalid, and the witnesses whose testimony is so certified are not rendered incompetent to testify on the trial by the fact that the shorthand

reporter appointed by the magistrate (Sec. 5227, Code, 1897), in making his transcript of the testimony, in part used the transcript of a private party, which transcript the reporter compared and found correct, and which was correct as a matter of fact. Such act was irregular but not reversible error.

LARCENY: Evidence to Sustain Verdict—Sufficiency—Larceny from 2 Person. Evidence reviewed and held sufficient to sustain a verdict of guilt of larceny from the person.

CRIMINAL LAW: Misconduct of Jurymen During Deliberations—3 Detailing Matters Outside of Evidence. A verdict will not be overthrown by the fact that, during the deliberations of the jury in the trial of a criminal cause, one of the jurors stated that the defendant "looked like" a party who some years prior thereto obtained a small sum of money from him by a sharp scheme.

Appeal from Union District Court.—HON. H. K. EVANS, Judge.

THURSDAY, APRIL 8, 1915.

DEFENDANT was indicted for the crime of larceny from the person. He was accused of stealing from the person of one Kirkendall a pocket book containing something over six dollars in money. There was a trial to a jury, and defendant found guilty. From the judgment pronounced upon the verdict, the defendant appeals.—*Affirmed.*

La Monte Cowles and *S. R. Allen*, for appellant.

George Cosson, Attorney General, *W. S. Rankin*, Special Counsel, and *H. P. Armitage*, County Attorney, for the State.

PRESTON, J.—1. The points relied upon as error and upon which a reversal is asked are, that the evidence was not properly taken before the committing magistrate; that the evidence is insufficient to sustain the conviction; and that there was misconduct of one of the jurors. At the preliminary hearing before the committing magistrate, one Beverling was appointed as shorthand reporter to take the evidence. One Shiffer, who was in the employ of the

1. INDICTMENT
AND INFORMATION:
minutes
of magistrate:
irregular taking:
motion to
quash.

Railway Company, was also present and took a shorthand report of the examination of the witnesses. Shiffer was not sworn as reporter. Shiffer made a transcript of the evidence. He testified as a witness in the district court that his report of the evidence was correct. Beverling's shorthand notes came apart, and, because it was easier to do so, he used Shiffer's transcript in making his own. But he testifies that after he had made his own transcript he compared it with his own shorthand notes and found it correct. It is admitted that the transcript made by Beverling was certified to the grand jury by the magistrate, and such notes were used by the grand jury as a basis upon which to find an indictment. The witnesses did not appear before the grand jury. Defendant moved to quash the indictment because the evidence was taken in the method just indicated, and the motion was overruled.

This does not seem to be a ground for setting aside the indictment under Sec. 5319 of the Code. When the witnesses were sworn on the trial, the defendant objected to the introduction of their testimony for the reason that there was no showing that their testimony was ever taken before the committing magistrate, or before the grand jury, and that the witnesses failed to appear before the grand jury, and no notice was served of their being made witnesses in the case. There is no showing or claim that the evidence which was finally adopted by Beverling and the committing magistrate and certified by them was not correctly taken down and transcribed. The objection is that Shiffer was not sworn and that Beverling used Shiffer's transcript, in part at least, in making the transcript which was filed and certified.

Sec. 5254 of the Code provides that an indictment can be found only upon evidence given by witnesses produced, sworn and examined before the grand jury, or furnished by legal documentary evidence, or upon the minutes of evidence given by witnesses before a committing magistrate.

Sec. 5227 provides that the magistrate shall, in the minutes of the examination, write out or cause to be written out the substance of the testimony given on the examination

by each witness, etc., and that, by agreement of parties or their attorneys, the magistrate may order the examination taken down in shorthand and certified substantially in the manner provided for taking depositions by a stenographer, etc.

Section 5228 provides that after the examination is closed, the magistrate must attach together the complaint, the warrant or order of commitment, if any, under which the defendant was brought before him, the minutes of the examination, including all depositions used, and annex thereto his certificate, which must set forth, in substance, the time and place of examination, and that the minutes thereof are true, which certificate must be officially signed by the magistrate.

Sec. 5373 provides, in substance, that witnesses not examined before the grand jury, or the minutes of whose testimony have not been made by the committing magistrate, or someone appointed by him, cannot be called by the state without notice to the defense.

Though it was somewhat irregular for Beverling to use Shiffer's transcript, the evidence shows that he compared his own transcript with his own shorthand notes; that the transcript was correct; it was certified by the magistrate. We think that this is a substantial compliance with the statute. The statute does not require that all the evidence shall be taken, but only the substance, and that it shall be certified by the committing magistrate as true. As stated, the evidence as transcribed by Beverling was so certified by the magistrate. We are unable to see that the defendant was prejudiced in any manner by the method pursued.

2. The defendant did not testify as a witness, and there was no evidence introduced on his behalf. The larceny is

2. LARCENY :
evidence to
sustain ver-
dict : sum-
ciency :
larceny from
person.

alleged to have been committed on a passenger train at the town of Creston, Iowa, March 3, 1914. Witness Ault, a traveling salesman, was a passenger on the train at the time of the alleged larceny. The train was standing at the time of the transaction. He says:

"As I saw it, when the crowd was getting in, this gentleman here who says his name is Rand was standing at the side of the entrance into the smoking compartment, he turned around and looked at me, then looked on into the bunch of people coming through; then the people commenced to come through and he ducked in and ducked back again and ducked in and out again. I wondered why he didn't go on in and sit down. I was sitting in the smoking compartment when he was pushing in the line of people coming in the train. When he pushed in he didn't go on through. I wondered what caused him to do that. Then he pushed in again and stepped out again, had his overcoat on one arm. The people were coming in the train. It had been in some five minutes. I was one of the first ones to get in the train. I saw defendant run his hand in the direction of Kirkendall's clothes. I suppose I was about four feet, possibly five, from them. (Witness illustrates how it was done.) He run his arm in like that, under his overcoat, and pulled it back again. The crowd kept pushing on and simply packed the entrance. Then he run his arm in his overcoat. That time when he brought it out and back was when I noticed this pocket book. I saw defendant's hand after he put it out towards Mr. Kirkendall when he pulled it back. When defendant brought his hand back there was something in it. I saw one end of this black purse. It was similar to Exhibit 'B' you show me. I saw a part of the purse. It was under his hand in a concealed way. I never saw either Kirkendall or Rand before. The second time he run his hand in, the pocket book was in his hand."

Q. "You know that was a pocket book?"

A. "From what I saw of it, it was."

Q. "Will you swear to the jury it was a pocket book?"

A. "No, sir."

"This transaction was between 11.30 and 12:00 o'clock noon. I came back to Creston that evening; was present when the pocket book was found by Mr. Allen. It was found in

the toilet room of the depot on top of some kind of a shelf or cover of some kind. Others were present. I had a conversation that day with Kirkendall in the car we were sitting in. Rand was not present."

Kirkendall testifies:

"My age is seventy-five. I used to be on a farm. Exhibit 'B' you show me is undoubtedly my pocket book. Had it last in my possession right here in Creston between eleven and twelve o'clock the third or fourth of March, I wouldn't be positive. I had six dollars and some change in it when I last had it in my possession. I was traveling that day from Albia to Omaha. When the train stopped at Creston I got up and went to the door, then I turned around and went back to get my seat. As I passed back there was a kind of jostle. I didn't think anything about it because my wife has been sick and I was in deep trouble. I didn't pay much attention to anybody. Mr. Ault spoke to me and I threw my hand to my pocket and the purse and all the money I had in it was gone."

Mr. Allen, Division Superintendent for the Railroad, with headquarters at Creston, saw defendant on March 3rd going from the head end of the car to the depot. He was the last one off the car when the train started. Observed defendant going directly toward the depot. Got back on the train, and returned to Creston at about seven o'clock that evening. Saw the pocket book, Exhibit "B," the evening of March 3rd, picked it up from the top of a closet in the gentlemen's toilet room in the depot. Others were with him. The shelf, or cupboard, was covered with dust, but there was no dust on the pocket book, that is, the dust which covered the closet was not over the pocket book.

Another witness had a conversation with defendant after the alleged larceny, in which he says he told defendant that the old gentleman lost ten or twelve dollars; that he didn't

know the exact amount, and defendant said he didn't; he lost six and a half. He says:

"I asked him how he knew. He said, well he lost six and a half."

Q. "The papers that evening had an account of the crime, the evening of the third?"

A. "I didn't see. I didn't see the papers of the date of the third. He told me the old man lost six fifty."

Another witness testified that defendant went under two different names, Charles Moss and William Rand; that he was registered at the hotel the last of February under the name of Charles Moss; that he saw defendant on the third of March about twelve o'clock, or a little after, soon after the train had left; saw him come out of the north door at the east end of the men's part of the depot. The waiting room is in the west end of the depot. There is a little hallway runs back through to the gent's closet, and then out around the gent's closet out around the north door. He says:

"That is the door I saw him come out of. Defendant told me he was the man registered as Charles Moss."

It is urged by the defense that, because the money taken from Kirkendall was not identified or found in the possession of the defendant, the evidence is not sufficient. But we are satisfied from a reading of the entire record that the evidence abundantly sustains the verdict.

3. It is said there was misconduct of the jurors. It is shown in support of the motion for new trial that they were giving their experiences in the jury room, and one of them stated to some of the others an occurrence that took place some years before on a train; that a man approached him on a train and engaged him in conversation, and that as they approached a certain town the man suggested that they each put in a dollar, and that he would go out and

3. CRIMINAL
LAW: misconduct of jury-
man during
deliberations;
detailing mat-
ters outside
of evidence.

get some lunch, and the man never came back. He said that man looked like the defendant. Did not say it was the defendant. The jurors, testifying, say that the statement had no influence upon them in arriving at a verdict. It is said by counsel for the defendant that, had witnesses been asked such a question upon the trial, such a statement would have been excluded. We suppose many things are discussed by jurors in their jury room which would not be admissible in evidence on the trial of the case. This was not stating evidence in support of any element necessary to be proved in the charge against defendant, as claimed by the defense. We suppose it is safe to say that in the experience of most judges and lawyers it is known that sometimes the attorney for the unsuccessful party will visit the jurors, or some of them, and try to convince them that their verdict was wrong, and sometimes get an affidavit from them couched in the language of the attorney, and often the juror files a counter affidavit to explain his statements, and occasionally, perhaps, a juror is convinced after the verdict that he may have made a mistake.

In *State v. Dudley*, 147 Iowa, at 653, the court said:

“Affidavits of jurors that they have been unduly influenced by their fellows, or of the reasons for assenting to the verdict, or of improper arguments resorted to in the jury room, or that they did not assent to the verdict, or that it was not the result of their deliberate judgment, or they did not understand the instructions of the court as these matters inhere in the verdict, are incompetent, and cannot be received to impeach the jury’s findings. . . . Jurors after having agreed to a verdict cannot, in order to have it set aside, explain by affidavit the ground or train of reasoning by which they arrived at the result. Should affidavits of this character be entertained, few verdicts would stand, as some jurors would be found in most cases who would allege as mistakes of law

or fact what were really afterthoughts suggested by the defeated party or his counsel."

It should be said here that counsel appearing for the defendant in this court were not the same as counsel who tried the case, and we do not intimate that counsel did see the jurors in this case, but we have simply stated the rule. Some of the jurors were placed upon the witness stand and examined in regard to this matter instead of making affidavits.

As suggested by counsel, the amount of money taken was not large, but this is not the test in a case of this kind. Robbery and larceny from the person are considered serious offenses. The length of time which defendant will be required to serve will be determined by the board of parole. The board will doubtless give the matter proper consideration at the proper time.

We discover no prejudicial error in the record, and the judgment is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS and LADD, JJ., concur.

ALBERT BALL, Appellee, v. GEORGE W. DAVENPORT, Appellant.

TRIAL: Motion for Directed Verdict—Adverse Ruling—Failure to

1 **Renew Motion—Waiver.** One who moves for directed verdict before the close of all the evidence, suffers an adverse ruling and fails to renew such motion after the close of *all* the evidence, thereby waives any error, if any, in such ruling.

CONTRACTS: Broker's Commission—Construction of Terms—"Con-

2 **summation"** of Deal—Jury Question. The use of words and phrases in such connection that reasonable minds may well differ as to the sense in which they are used precludes the court from declaring their meaning as a matter of law. In a case wherein a real estate broker's commission was due "on the consummation of said deal," *held* that defendant could not justly complain that the court directed the jury to determine the sense in which the words were used.

CONTRACTS: Construction—Giving Life to All Facts. A construc-

3 tion of a contract that gives due effect to all the facts will always

be preferred to one which makes a part of the facts idle. In other words, a construction is to be avoided which accomplishes for a thing done no more than would exist without the doing of that thing. So held under conflicting claims as to when a broker's commission was due under the contract.

PLEADING: Real Estate Brokers—Allegation—Proof—Variance—

- 4 **Oral Contract—Written Adoption.** Proof must correspond to allegation. Rule held not violated by (a) declaring on an oral contract and (b) on the trial reinforcing the claim by showing a subsequent written adoption of such oral contract.

PRINCIPLE APPLIED: Plaintiff pleaded that defendant orally employed him to *procure a contract* for an exchange of defendant's lands for an agreed commission; that he caused defendant and a third party to enter into a writing stipulating for an exchange, but providing that defendant should not be bound thereby until the defendant had finally approved its terms, after examining the lands belonging to the third party; that defendant did later in writing approve such writing. On the trial, plaintiff was permitted to show in support of his pleading that there was inserted in the writing between defendant and the third party (being the writing which defendant at a later date finally approved) the following clause, to wit: "In the event of the approval of said contract by the said George W. Davenport (defendant), then and in that event he agrees to pay Albert Ball the sum of \$350.00 as compensation for his services as his agent in the consummation of said deal." *Held*, to constitute neither (a) variance nor (b) failure of proof.

TRIAL: Instructions—No Evidence Applicable—Who May Complain.

- 5 An instruction should not be given unless there is evidence in the record to which it can be applied; but if an instruction be given in violation of this rule, a party who is thereby given an unwarranted chance for a verdict cannot complain.

PRINCIPLE APPLIED: Plaintiff, a broker, claimed his commission was due when the contract for exchange of land was signed. Defendant claimed the commission was due only when the exchange was actually executed. The court instructed that, if one party understood the agreement as he claims and the other party as he claims, and neither agreed to what the other understood, then there was no contract. There was no evidence of the failure of the minds to meet. *Held* error, but as it gave defendant a chance to secure a verdict to which he was not entitled, he could not complain.

TRIAL: Broker's Commission—When Earned—Instructions. Instructions reviewed and held to fully and fairly present the contentions of the parties as to when, if at all, a broker's commission was earned.

Appeal from Keokuk District Court.—HON. HENRY SILWOLD, Judge.

FRIDAY, APRIL 9, 1915.

ACTION to recover \$350.00 for alleged services in procuring a contract for the exchange of property. The contract was got, but the properties were not exchanged. Under the record, one Billick, the person who contracted with defendant for the exchange, was in default for failing to furnish such an abstract as the contract required, and it has been adjudicated that on account of such default he could not compel this defendant to perform. The verdict of the jury awards plaintiff the full amount of his claim, and defendant appeals.—*Affirmed.*

Stockman & Backer, for appellant.

Wagner & Updegraff and *Hamilton & Beatty*, for appellee.

SALINGER, J.—I. Much of which defendant complains is presented by exceptions to the overruling of a motion by defendant that verdict be directed for him. Appellant did not stand upon this motion. He introduced testimony after the motion was overruled, and did not renew same at the close of all the testimony. It is settled in this court that this waives the motion, and that, therefore, no error involved in denying same is available on this appeal.

1. **TRIAL:** motion for directed verdict: adverse ruling: failure to renew motion: waiver.

II. The ultimate dispute is this: Plaintiff claims that his commission was due at the time when he got the parties to sign a contract to exchange. Defendant insists that none was due until the exchange stipulated for was actually con-

summated on the terms of the signed contract, and that failure to consummate it is wholly due to the fact that Billick was either unable or unwilling to perform, or both.

In talks had in October, 1912, and before anything was reduced to writing, a one per cent commission, amounting to \$350.00, was agreed on, and it is admitted it is not a commission for a sale, as distinguished from an exchange. Whatever conflict there may be is as to the contention of the appellant, testified to by him, that plaintiff was not to have such commission until after a satisfactory exchange of lands was actually consummated. For this position it is pointed out:

1. That at the outset plaintiff asked whether defendant "would consider an exchange for his farm here for a farm in Kansas," and that defendant said he "might consider such an exchange, depending upon the location of the farm there."

2. That defendant asked what commission he would charge "for handling the deal."

3. The following testimony of the plaintiff:

Q. "And he asked you what commission you would charge for the exchange if you made one?"

A. "Yes, sir, he asked what commission I would charge for handling *this* deal, and I said as much as it was a trade I would only charge him one per cent. Plaintiff asked me how much I would charge for handling *the* deal."

4. The wife of plaintiff says defendant told her he would do nothing with another who wanted two per cent "for making the exchange," until he heard from plaintiff, "on the Kansas deal."

5. After these talks between the parties, and before November 25th, the defendant signed a writing which recites that "the parties hereto have agreed upon an exchange of real estate." But this statement throws no light on the dispute, because the fact that an exchange had been agreed on leaves it open whether pay was to be got for obtaining such

contract, or for obtaining the exchange stipulated for in the contract.

Up to this point, there is some reason to claim that the evidence fails to support the theory that commission was to be paid for the mere getting of the contract.

So far as it is material in this suit, said writing provides that on the exchange of deeds each party is to deliver to the other "a merchantable abstract of record," showing title in each grantor, and that the contract shall not be binding on defendant unless, on or before December 5, 1912, he, after examining the condition and reasonable value of the Kansas land, approve the contract by signing a ratification written on the contract. At the suggestion of plaintiff, a clause was inserted that, if defendant does so approve, he agrees to pay plaintiff \$350.00 for his services as agent "in the consummation of said deal." After such investigation, defendant signed the following ratification:

"November 25, 1912. I, George W. Davenport, having made investigation with reference to the condition and reasonable value of the 480 acres of Kansas land described in the foregoing contract, do hereby ratify and approve said contract and the terms and conditions thereof."

The answer of defendant, in so far as relevant here, asserts merely that by valid contract it was actually understood and agreed that no commission was due until the exchange "was fully made and completed"—and that "the alleged ratification and approval of said alleged contract referred to in plaintiff's substituted petition was secured, if at all, at and with the undue request and solicitation of the plaintiff." There is no evidence upon the claim of undue influence, except that when it came to signing the ratification plaintiff asked defendant what he was going to do; and defendant hesitated and hung back for a little while—and the whole record indicates that defendant is not claiming to have been unduly influenced into an unsatisfactory agreement,

but is defending because the owner of the Kansas land did not comply with the agreement into which defendant did enter.

2. CONTRACTS :
broker's com-
mission : con-
struction of
terms : "con-
summation" of
deal : jury
question.

III. It is apparent the real controversy begins with the writing done in Iowa, and involves some later writing done in Kansas. And, as we view it, the controlling question is whether the trial court erred in its treatment of said writing.

The first part of a continuous clause therein is that certain things shall be done by defendant "in the event of the approval of said contract" by defendant. After thus stating that what he agreed to depended on this approval, he adds what he is to do in event of approval, to wit, to pay plaintiff \$350.00 "as compensation for his services as their agent in the consummation of said deal." The essential claim of defendant is that the trial court should have disregarded the part of the clause which makes approval a condition precedent to payment; that it should have read the writing as though it merely agreed to pay for services in consummating "said deal," and should have charged that, as matter of law, the word "deal," as here used, refers to the consummation of an exchange, and not to the obtaining of a completed contract obligating the parties to exchange. Passing whether the charge complained of was so excepted to as to present what appellant here complains of, the instructions refused and those given clearly exhibit the difference between the theory of the court and that of defendant.

The offered instructions proceed on this line: Number sixteen charges that the undisputed evidence shows plaintiff was to be paid on the "consummation of said deal" and that this means the actual exchange of the properties; number two, that the performance of the contract means the completion of the exchange; numbers three, eleven and seventeen, that plaintiff cannot recover if the contract to exchange was not in fact carried out. Number four urges that plaintiff cannot

recover if Billick could not or would not perform. Instruction number ten given by the court instructs that the meaning of the word "consummation" depends upon how and in what connection it is used; that the consummation of the contract is reached when all has been performed which the contract requires; and that, here, if the contract was that plaintiff was to be paid when the contract between the defendant and Billick was signed and approved by defendant, then such signing and approval was a consummation; but that if it was the contract that no payment should be made until the deal was fully consummated by the execution and exchange of deeds, then the contract between the parties would not be consummated until such deeds were executed and delivered. An exception to this instruction urges that the word "consummated" should be construed according to the context and approved use of the language; and that the instruction fails so to construe it; that there is no evidence whereon to base the definition attempted by the instruction, and no evidence to show that the word was used in any other than the ordinary and usual way, form and manner. Instruction number five, given, directs the jury that plaintiff cannot recover if he was not to be paid "until deeds had been executed," but could recover without that if he was merely obliged to obtain a contract, instead of the performance of the contract. Number nine declares that the default of Billick is established, and that, therefore, plaintiff has not earned his commission if performance of the contract was required; but that if the agreement was to pay a commission for obtaining the signing and approval of the contract Exhibit A, then the default of Billick was wholly immaterial.

It is manifest that the court took the position that it was a question of fact what the parties meant by the words "consummation of said deal;" that if the jury found it referred to the obtaining of the contract, plaintiff must recover; and that if it found it referred to actually consummating an exchange of properties, the plaintiff could not recover. It

was the theory of defendant that the words "consummation of said deal," as a matter of law, referred to the consummated exchange of properties, instead of to obtaining the signing and approval of the contract.

In support of the position taken by defendant in offering instructions and excepting to instructions given, it is stated in varying ways that the deal referred to in the writing was an exchange of property; that nothing else is the subject of the contract, and that these words, as a matter of law, refer to the consummation of the exchange; and that the court should have so charged; that any other theory is unnatural and strained; that there was no evidence warranting the jury in construing these words to relate to a mere approval and signing of the contract, and no evidence that plaintiff was to be paid merely for obtaining such signing and approval. It is urged to be an unreasonable construction that defendant would agree to pay commission for the mere signing of the contract; that he would allow an agent to recover upon getting a contract signed by an utterly insolvent buyer or one who broke the agreement; that in this case it would mean compelling defendant to pay when he got nothing of value in return. It may be added in passing that there is no evidence that Billick is insolvent, and that, while it has been decided he could not have specific performance, it has not been decided that defendant could not enforce such performance.

Some stress is laid on the fact that the *Reynolds* case, 148 Iowa 213, gives the Webster dictionary definition of the word "deal," that it is "an arrangement to attain a desired result by a combination of interested parties." No doubt this correctly defines "deal;" no doubt that the possibility of these consequences upon one construction have bearing on what construction should be adopted. But neither concession bears on whether the construing should be done by the court instead of the jury, and both do not necessarily establish that the jury arrived at so arbitrary a construction as that we should interfere.

When reasonable minds may differ on which one of two conclusions should be drawn from given facts, it is a jury question which deduction is the true one. Where one urges a deduction which excludes a part of the evidence, while the other presents one which makes all the evidence effective, it is, putting it at its best for the one whose theory does not fit all the facts, at least a jury question whether the position which gives life to all the evidence should not be sustained rather than the one which makes a part of the facts idle. Have we such a case?

The writing provides that it shall not bind defendant unless, after he has signed it once, he, after investigation, approves in writing what he has signed. Without the provision, then, that payment should be made "in the event of approval," no payment could be due before such approval, because, whatever deal is referred to, no deal could be consummated before such approval was made. If it is possible to avoid it, construction should not reach the result that the written provision has no purpose except one that would be accomplished without it. As, without this provision, no commission is due until after approval is made, the written words as to payment in event of approval are, on defendant's theory, merely deliberately written waste matter. On the theory of plaintiff, this clause was inserted to accomplish something. He says it was put there to provide that the deal shall be deemed consummated when approval is indorsed, and, therefore, payment made then. The defendant's theory cannot stand if effect be given to all the writing. The other alone uses all the facts. As said, defendant has no just complaint that the choice between such theories was submitted to a jury.

Greusel's case, 98 Iowa 405, to which we are referred, decides that, where the owner agreed to pay a commission in case he should succeed "in disposing of" the property on acceptable terms, and the agent procures a buyer who makes a written contract to buy the goods, and such purchaser is

unable to perform his contract, the agent is not entitled to commission. One extract from the decision makes its essential holding thoroughly clear:

“Plaintiff’s contract to dispose of said property was not executed by finding one who would enter into a contract for its purchase in the manner and on terms agreeable to defendant. It seems to us that the contract of the parties contemplated a complete sale and transfer of the property or the making of such a contract of sale as was enforceable. Owing to the inability of the defendant to make title the sale was never fully consummated.”

It seems to us that this case does not rule for defendant. Of course, one who is “to dispose of property” before a commission is due cannot recover if the property is not disposed of, even though a contract is made which will dispose of the property if the contract be performed. This is but saying that no recovery on a contract can be had without performing that contract. It is of no help if here the commission was to be paid for merely getting the contract. The same law which denies pay on the contract to dispose of property may grant pay for getting a contract though no property is transferred. In each case, the law enforces the contract which was made.

We are favored with other citation of authorities, and with some analysis by way of avoidance of cited authorities. We have here a case wherein this cannot be helpful. If it is once settled what theory of the facts we are bound to adopt, the law applicable is settled and plain. There is and can be no law which prevents one from agreeing to pay for the mere getting of a contract to exchange, nor another from agreeing that nothing shall be paid him until the exchange is actually effected. The right to make either agreement is self-evident. It is not a question of law, but of ascertaining, under the

rules governing appellate review, which agreement was made.

3. PLEADING :
real estate
brokers : alle-
gation : proof :
variance : oral
contract :
written
adoption.

IV. It is strenuously urged that there is such variance between plea and proof as to leave the allegations of the parties unproved—as to amount to a failure of proof. We doubt whether the record presents such claim

for review.

The motion to direct verdict, probably, does present it, in the statement that “plaintiff has failed to establish a right to recover under his alleged cause of action pleaded in his petition herein;” but, as seen, that motion is waived—and the assertion in motion for new trial that it was error to overrule the motion to direct verdict does not obviate that waiver.

The motion for new trial asserts, in the most sweeping terms, that there was error in all rulings upon objections to testimony. If this be treated as an attempted objection, that matter admitted is not warranted by the pleadings, it still appears that no objections were made, and hence that none were ruled on. This narrows the presentation of the alleged variance to refused instructions offered and exceptions to the charge given. The offered instructions which can, by possibility, be entitled to consideration on this point are as follows: Numbers 5, 6, 7 and 8 request a charge that if one party understood the agreement in one way, and the other in a different way, there was no meeting of the minds, and, therefore, there should be a verdict for defendant. Numbers 14 and 15 urge that, as defendant may plead inconsistent defenses, plaintiff must establish all that he alleges, despite an admission by defendant in one of his defenses that he had employed plaintiff as his agent. Numbers 2, 3, 11, 16 and 17 present in various ways that plaintiff was entitled to nothing because no exchange had been consummated. No instructions excepted to, and no exception to the charge, or any part of it, seem to us to touch this question of variance. This is not elaborated here because it will be necessary in other heads of the discussion to analyze all instructions and excep-

tions for which, in reason, any claim can be made that they have any reference to variance or failure of proof.

V. But without reference to whether the point is sufficiently presented, we are clear that it is not well taken. The petition alleges that about October 29, 1912, defendant "orally employed the plaintiff to act as his agent to procure a contract of exchange satisfactory and acceptable to the defendant" of described lands; that defendant so and further agreed "that in the event of plaintiff procuring a contract with the owner of the 480 acres of Kansas land for the exchange of his farm of 280 acres, at \$125.00 per acre, for the 480 acres in Kansas," on terms acceptable to the defendant, then defendant would pay plaintiff a commission of one per cent on the value of his land, as taken in said exchange, or \$350.00. It is alleged further "that the plaintiff then and there orally agreed to attempt to procure a contract of exchange for the said defendant" of said lands; further, that about November 18, 1912, plaintiff procured the making of a written contract which recites that the parties to it "have agreed upon an exchange" for said lands; further, the contract is not to be binding on defendant until he approves of it in writing, after investigation of the Kansas land; that on November 25th, defendant did so approve in writing; that there is a further proviso inserted, which binds defendant, if he so approves the contract, to pay plaintiff \$350.00 "as compensation for his services as their agent in the consummation of said deal." It is alleged "that by reason of the foregoing facts" the defendant owes plaintiff \$350.00, for which he prays judgment.

That one may not sue on one theory and recover upon proving a totally different one is, of course, true; and that such recovery was permitted is insisted on in oft repeated statements, which vary merely in form. The essential claims can be grouped under the following heads:

1. Plaintiff has not declared on the contract made in Kansas on November 25th, but on one made October 29th, in Iowa.

2. Where the allegation is of an agency to procure an exchange contract, and the proof is of an agency to obtain a consummated exchange, there is failure of proof.

We find no variance on the first position. The petition has not elected between contracts of different dates, and thus caused plaintiff to fall between two stools. He declares on his oral agreement made in Iowa in October, and seeks to reinforce it by a written adoption of it made in Kansas in November. We therefore do not agree that the written agreement to pay is not binding on the theory that no claim is made except on verbal agreement.

The second position, too, has no support in the record. It may be conceded, for the sake of argument, that there is some evidence tending to show an agreement to pay on a consummated exchange rather than for merely obtaining a contract agreeing upon an exchange, but, surely, it is possible to infer from the testimony that plaintiff should be paid for merely obtaining such contract; and, as we have had occasion to point out, there is a writing for which it may in reason be claimed that it tends to sustain plaintiff's position. On the whole, it is clear that the allegation of the petition is supported by some proof relevant to what the petition pleads.

VI. Instruction 6 is, in substance, that if one party understood the agreement as he claims, and the other party as he claims, and neither agreed to what the other understood,

then there is no contract—and that to determine how defendant understood the agreement, the jury could consider that clause in the writing which says “in the event of the approval of said contract by the said George W. Davenport, as aforesaid, then and in that event, the said parties of the first part agree to pay to Albert Ball the sum of \$350.00 as compensation for his services as their agent in the consummation of said deal.”

This instruction is not vulnerable to the objection made in argument that plaintiff's evidence tends to show a contract

4. TRIAL: Instructions: no evidence applicable: who may complain.

to pay on a consummated exchange, while the charge allows a recovery on merely obtaining a contract agreeing to an exchange. The instruction does not deal with that question at all, but only with the effect of the failure of the minds of the parties to meet. And the exception makes no complaint that this instruction is irrelevant to the proof. It is that the instruction allows the jury to place its own construction on the meaning of this clause in the contract and limits its consideration to said clause, when, instead, it was the duty of the court to construe it. It would have been a better objection to this instruction, were defendant in position to make it, that there was no evidence of failure of the minds to meet, and offered instructions 5, 6, 7 and 8, whose refusal is complained of, do urge that defendant should have a verdict because the minds of the parties did not meet. Now, in the first place, the refusal of these instructions is cured by giving the same thought in instruction number 6. But we think there was nothing to cure, and that these offered instructions were rightly refused because we find no evidence whereon to base them, notwithstanding the sweeping claims for the defendant that neither party had any thought of making such a contract as plaintiff claims. This case does not present that each failed to understand what was confessedly said, as the other did, but it presents simply a conflict as to what was said, and how what is said or written shall be construed, and by whom. It follows that, while it was error to give instruction six, this is not because it permits a recovery variant from plea, but because there is no evidence of a failure of minds to meet. But as this errs in defendant's favor by giving him an unwarranted chance for a verdict, he, of course, cannot complain.

We think that at most appellant can but claim that it was a fair question whether such a contract as plaintiff claims was or was not in the minds of both. In such case, it was proper for the court to submit it, as was done in instruction six, even if proper objection had been made; and, as we have said, none such was made.

VII. A number of complaints are made as to the giving and refusing of instructions. Instruction one charges that plaintiff claims from the defendant for services rendered as a real estate agent, and he states for his cause of action that in October, 1912, defendant orally employed him to act as his agent to procure a contract of exchange satisfactory to defendant of certain lands owned by defendant and other lands; that he brought defendant and Billick together, and through his efforts caused the parties to enter into the contract Exhibit A; that defendant denies plaintiff's contract, and avers that by the oral contract plaintiff was not to receive any pay until after the proposed exchange of property had been fully made and completed; that such exchange has never been made, and that plaintiff has wholly failed to produce a party for such exchange as agreed with him by defendant. The exception to this is that it does not state one defense pleaded, to wit, that plaintiff has never produced a party who was ready, willing and able to make an exchange; wherefore, the consideration of the contract with plaintiff has failed. It needs but an inspection of number one to see that such defense was not omitted.

By instruction five, the plaintiff is to be denied a recovery if the jury finds that he was not to be paid "until deeds had been executed" by each party. The exception to it "and to the word 'deeds'" is that it "does not include the matters necessary to such completed exchange as is contemplated by the contract." A similar complaint is lodged against number ten. It would not have bettered the charge to have put all elements that might be involved in an exchange into every paragraph of the charge. It is fairly clear that the charge as a whole gave all these elements proper presentation. As to the refusal of instructions presenting in effect that there could be no recovery unless the exchange was consummated, and offered instruction number four, which charges that plaintiff cannot recover if Billick could or would not perform, we have

5. TRIAL :
broker's com-
mission : when
earned :
instructions.

to say that they were properly refused because they ignore the possibility of finding that commission was to be paid for merely getting a contract, in which case the failure, inability or unwillingness of Billick to perform would neither demand nor justify a verdict for defendant. So far as proper, this point was covered by instruction nine, which charges that the default of Billick is proven, but that this becomes immaterial if commission was to be paid upon the mere signing of contract. And the only objection made to number nine is the statement, that if commission was not due "until the deeds had been exchanged by Davenport and Billick," then the use of the word "deeds" is improper, and it limits the jury to a consideration of exchange of deeds only, and fails to include other elements involved in the proposed exchange of property. Instruction ten charges, in effect, that it is for the jury what deal is referred to in the agreement to procure the "consummation of said deal." It is said that if the "contract" was as plaintiff claims, one finding should result; the opposite finding, if the "contract" was the one asserted by defendant. The exceptions to this again present the thought that, in emphasizing delivery, or execution and delivery, of deeds, other elements involved in the exchange are omitted, an objection already herein ruled upon. But they also urge that, as there are two contracts referred to in the instruction, the same is confusing as to which contract is being referred to in different parts of the instruction. This appears to us to be hypercritical and to be untenable upon the face of this instruction, to say nothing of other instructions which clarify instruction ten, if it needs it.

Instruction number three says plaintiff cannot have a verdict without proving that the contract he claims was made and fully performed by him, but that if he has failed to establish "such facts" by a preponderance, then he cannot recover. The exception to this is that the jury is not told what the elements of the contract are, "and also because the use of the word 'facts' does not clearly show or state, what is

intended to be referred to." If the objection were good to this instruction if the instruction stood alone, and we do not think it is, it would still not be well taken in view of other instructions given and to be read in connection with number three.

We find no error in the record, and the judgment of the district court, therefore, must be and is—*Affirmed*.

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

GEO. J. BROWN, Appellant, v. G. B. MELLOON, Appellee.

JUSTICE OF THE PEACE: Bonds—Failure to Mark "Filed"—

- 1 **Nonjurisdictional Defects.** The act of (a) securing the approval of the justice of the peace of an appeal bond and (b) leaving such bond with the justice are the two essentials in perfecting an appeal. The failure of the justice to formally mark the bond "filed" in no wise affects the legal force of the bond.

JUSTICE OF THE PEACE: Bonds on Appeal—Sureties Alone Sign-

- 2 **ing—Effect.** Judicial bonds signed by the sureties only are valid in the absence of a statute to the contrary. (Sec. 4552, Code.) So held in the case of an appeal bond in justice court.

Appeal from Sac District Court.—HON. M. E. HUTCHISON, Judge.

FRIDAY, APRIL 9, 1915.

ACTION originally commenced before a justice of peace to recover compensation for shelling corn. The justice rendered judgment for plaintiff and defendant appealed to the district court. When the case reached the latter court, plaintiff filed a motion to dismiss the appeal because no sufficient appeal bond was filed. This motion was overruled. The case then went to trial, resulting in a judgment for defendant, and plaintiff appeals.—*Affirmed*.

Chas D. Goldsmith, for appellant.

Malcolm Currie, for appellee.

DEEMER, C. J.—The sole question presented by the appeal is the correctness of the trial court's ruling on the motion to dismiss. Code Sec. 4552 provides in substance:

1. JUSTICE OF
THE PEACE:
bonds: failure
to mark
"filed": non-
jurisdictional
defects.

"The appeal is not perfected until a bond in the following form, or its equivalent, is taken and filed in the office of the justice or clerk as above provided, in an amount sufficient to secure the judgment and costs of appeal:

"The undersigned acknowledge ourselves indebted to in the sum of.....dollars, upon the following conditions: Whereas.....has appealed from the judgment of....., a justice of the peace, in an action between.....as plaintiff, and.....as defendant:

"Now, if said appellant pays whatever amount is legally adjudged against him in the further progress of this cause then this bond to be void.

"Approved:

"E..... F....., Justice.

A..... B....., Principal.

C..... D....., Surety.

"If the judgment is affirmed, or if on a new trial the appellee recovers, or if the appeal is withdrawn or dismissed, judgment shall be rendered against the principal and surety on said bond."

The bond given by defendant for the appeal was in this language:

APPEAL BOND.

\$150.00.

We, the undersigned, acknowledge ourselves indebted to Geo. J. Brown in the sum of one hundred and fifty dollars upon the following conditions:

Whereas, G. B. Melloon has appealed from the judgment

of Geo. J. Speaker, a justice of the peace of Eureka township, Sac County, Iowa, in an action between Geo. J. Brown as plaintiff and Geo. B. Melloon, as defendant.

Now, if said appellant pays whatever amount is legally adjudged against him, in the further progress of this cause, then this bond to be void.

Approved: GEO. J. SPEAKER.

A. D. WOODKE,
T. L. VEITCH.

State of Iowa, Sac County.

The undersigned, whose names are signed to the above bond as sureties, being severally sworn depose and say, and each for himself says, that he is a resident of the state of Iowa, and a free holder therein; that he is worth double the amount to be secured by the above bond, beyond the amount of his debts, and that he has property liable to execution in this state equal to the sum to be secured by the above bond.

A. D. WOODKE,
T. L. VEITCH.

Sworn to before me and subscribed in my presence by the said A. D. Woodke and T. L. Veitch this 5th day of April, 1913.

GEO. J. SPEAKER,
Justice of Peace.

This bond was approved by and left with the Justice, and by him filed with the clerk of the district court, with his transcript of the record.

It will be observed that this bond was not signed by the appellant Melloon, and that it was not marked "filed" by the justice, and upon these defects or omissions, the motion to dismiss the appeal was grounded. The bond was approved by and left with the justice, and his failure to mark it "filed" is not a jurisdictional defect. *Brock v. Manatt*, 1 Iowa 128.

Failure to place a filing mark upon the bond, being the nonperformance of a mere ministerial act, did not defeat the appeal.

II. The other proposition is a more troublesome question and one upon which there is an apparent conflict in the cases; a conflict which, upon close analysis, is apparent rather than real. Whether or not a bond requiring sureties should be signed by the principal obligor depends (1) upon the nature of the bond; (2) upon the statutory requirements, if it be an official or judicial bond; and (3) upon the nature of the liability imposed.

2. JUSTICE OF THE PEACE: bonds on appeal: sureties alone signing: effect.

If the instrument be a mere contract obligation of a named principal and sureties, and it be not signed by the principal, then, as there is no principal obligation, there is no undertaking on the part of the sureties; and if signed by them alone, there is no enforceable liability; for their obligation is secondary only. If the bond be a statutory one, the nature thereof is an important consideration, especially if the statute be silent as to its terms. As a rule, a bail bond, in the absence of statutory permission for sureties alone to sign, must be signed by the principal obligor or the defendant in the action. This rule is for the protection of the sureties, that they may at any time arrest the principal on the bond itself, and for other reasons not necessary to be enumerated. But if it be a mere recognizance, it need not ordinarily be signed by the principal. In this state, neither bond need be signed by the principal. See Code Secs. 5501, 5613. *State v. Patterson*, 23 Iowa 575.

If a bond be statutory and the signature of the principal obligor is required, such bond, if not signed by him, should be held defective or entirely void. But unless the statute be mandatory, the bond need not be signed by the principal obligor, if he is liable without signing the instrument. *Minton v. Ozias*, 115 Iowa 148; 1 Ency. of Pleading & Practice, 973.

Again, something depends upon the nature of the obligation, and oftentimes more upon the intent of the parties. If the bond be joint only, there is much reason for holding that all the obligors should sign; but if joint and several, or several

only, the number of parties signing is quite immaterial. In this state, all such bonds as the one here involved are joint and several (Code Sec. 3465) and any one or all the makers could be sued thereon; and there was no necessity of joining the principal even if he *had* signed the obligation. *Jones v. Wilson*, 11 Iowa 160; *Poole v. Hintrager*, 60 Iowa 180; *Citizens Bank v. Oleson*, 47 Iowa 492.

Again, it may be that a bond is incomplete when not signed by some party named in it of which the obligee has notice, either from the terms of the instrument or otherwise; in which event, it is held an imperfect instrument because the conditions justifying its delivery have not been complied with. In such cases, bonds are held inoperative and unenforceable because delivered without securing the necessary parties as obligors.

There is no suggestion in this record that any of the parties contemplated or expected that the bond would be signed by the appellant Melloon, before its delivery to the justice, or that it was not signed by all the parties who were expected to sign, so that this question is out of the case.

At the time the bond was given, Melloon was already obligated by the judgment to pay the amount adjudged against him by the justice; and, had the case been affirmed, a judgment would have been rendered against him in the district court. Such judgment was necessary to fix any liability against the sureties on their bond. In other words, the obligation of the sureties was to pay whatever amount was adjudged against their principal during the further progress of the case. The principal's liability did not depend upon the bond, and it was not necessary for him to sign it in order to fix his liability. The sureties, by the terms of their bond, agreed to pay the amount so adjudged against him. Had the principal signed the bond, it would have added nothing to his liability and given no protection to the sureties which they did not possess without it. The principal's obligation is stated, and the sureties undertook the performance thereof, in the

event their principal (the appellant) did not perform, and they could be sued jointly or severally without joining their principal, and in the event they were compelled to pay the judgment, they could, in an action on the bond alone, by showing a judgment against the principal obligor, the appellant in justice's court, and the payment of that judgment, have recovered from the principal defendant the amount paid by them. They could lose nothing from the fact that the principal obligor did not sign the instrument with them.

It is said, however, that the statute expressly requires the signature of the principal. It will be observed that this statute in express terms provides that the bond may be in the form set out *or its equivalent*. So that the question narrows itself down to the one inquiry, Was the bond given the equivalent of the form set out?

In *Moore v. Manser*, 9 Iowa 47, we said: "The argument made under this head assumes that the undertaking of the party appealing must be in exact conformity with the form given in Sec. 2333 of the Code, and must be approved or attested in the precise mode therein stated. This is not necessary. A recognizance equivalent to the form given and a substantial compliance with the directions of the statute by the justice is all that is necessary."

As already indicated, the signature of the appellant, the principal obligor, would have added nothing to his legal liability that was not created by the bond, but was established or to be established in a legal proceeding in which the bond was given; and it would be extremely technical to say in such circumstances that the bond was not the equivalent of one signed by the principal obligor, the appellant in the case.

Practically all the cases holding that a bond is invalid and unenforceable if not signed by the principal were decided upon the theory that the instrument itself created the only obligation of the principal; or that the statute expressly required the signature of the principal; or that the sureties would

in some manner be prejudiced because of the failure of their principal to sign, or because it was within the contemplation of the parties that the principal should sign before delivery, or the liability created was joint only, and not joint and several.

This statement will be confirmed by an examination of the following, which are usually cited in support of the contention that a bond not signed by a principal is of no validity. *Hall v. Parker*, 37 Mich. 590; *Bunn v. Jetmore*, 70 Mo. 228; *Mayo v. Renfroe*, 66 Ga. 408; *Board of Education v. Sweeney*, 1 S. D. 642 (48 N. W. 302); *Martin v. Hornsby*, 55 Minn. 187 (56 N. W. 751); *Weir v. Mead*, 101 Cal. 125 (35 Pac. 567); *Ferry v. Burchard*, 21 Conn. 597; *Bean v. Parker*, 17 Mass. 591; *Russell v. Annable*, 109 Mass. 72; *Goodyear Co. v. Bacon*, 24 N. E. (Mass.) 404.

The current of modern authority is to the effect that, in the absence of statute expressly requiring it, a judicial bond signed by sureties alone is valid and may be enforced. They proceed upon the theory that, as the signature of the principal adds nothing to his liability, and the want of it takes nothing away from the sureties, and in no manner increases their burdens or robs them of any of their rights, the failure of the principal to sign does not affect the validity of the bond. See *Weir v. Mead*, *supra*; *Cockrill v. Davie*, 14 Mont. 131 (35 Pac. 958); *St. Louis Brewing Co. v. Hayes*, 38 C. C. A. 449 (97 Fed. 859); *Pima County v. Snyder*, 44 Pac. 297 (Ariz); *McKissack v. McClenden*, 32 So. (Ala.) 486; *State v. Bowman*, 10 Ohio 445; *Douglas County v. Bardon*, 79 Wis. 641 (48 N. W. 969); *Loew v. Stocker*, 68 Pa. St. 226; *Tillson v. State*, 29 Kans. 452; *School Trustees v. Sheick*, 8 N. E. (Ill.) 189; *Clark v. Hennesey Bank*, 14 Okla. 572, 2 Ann. Cases, 219; *U. S. Co. v. Haggart*, 91 C. C. A. 289 (163 Fed. 801); *Kenck v. Parchen*, 57 Pac. 94; *Adams v. Williams*, 97 Miss. 113 (52 So. 865); *Wright v. Jones*, 120 S. W. 1139.

This principle has been applied to replevin bonds: *Matter of Cahill*, 48 Mich. 616; recognizances,—*State v. Peyton*, 32

Mo. App. 522; *Irwin v. State*, 10 Neb. 325; indemnity bonds,—*Woodman v. Calkins*, 13 Mont. 363; attachment bonds,—*Adams v. Kellogg*, 63 Mich. 105; and appeal bonds,—*Webster v. Wailes*, 35 Fla. 267; *Harrison v. Bank*, 3 J. J. Marsh. (Ky.) 375; *Lindsay v. Price*, 33 Tex. 280; *Johnson v. Johnson*, 31 Ohio St. 131.

The bond in this case was not delivered contrary to instructions and, so far as this record discloses, was intended to be delivered in just the form in which it now appears. It was, therefore, valid and enforceable and of the same legal effect as if it had been signed by the appellant, the principal obligor.

It met the requirements of the statute, and should be held sufficient. What is said in *Novak v. Pitlick*, 120 Iowa 286, does not run counter to the rules here announced; but rather is confirmatory of them. That cause was decided on the theory that according to the understanding of the parties the bond was to be signed by the principal obligor before delivery to the obligee, of which fact the obligee had notice from the face of the instrument itself. Here there is no such contention. There is nothing on the face of the instrument or in the attendant circumstances to indicate that anyone else was to sign the instrument. The bond does not name anyone as principal, and it is a clear undertaking to pay whatever amount was legally adjudged against Melloon, during the further progress of the case.

It could undoubtedly have been enforced against the sureties without joining Melloon, and the amount of the judgment obtained against Melloon would be conclusive against both him and his sureties; and if they paid the judgment, they would be entitled to recover against him, by simply producing their bond showing that they were sureties for the payment of the judgment. We agree with the trial court in its conclusion, and the judgment must be, and it is—*Affirmed.*

LADD, GAYNOR and SALINGER, JJ., concur.

JOHN T. GOSS, Appellant, v. J. J. LANIN et al., Appellees.

JOINT ADVENTURES: Rights, Duties and Responsibility of Par-

1 **ticipants—Evidence Reviewed.** As preliminary to a question of fact, the rights, duties and responsibility of those embarking in joint adventures are stated generally, and thereupon evidence reviewed and held insufficient to show that plaintiff and defendants ever entered into a joint adventure (or partnership) for the promotion and construction of a railway, and consequently there was no occasion for the court to consider what the duties would have been had such relationship existed.

Appeal from Chickasaw District Court.—HON. A. N. HOBSON, Judge.

FRIDAY, APRIL 9, 1915.

ACTION for an accounting. Opinion states the facts.—*Affirmed.*

P. H. Paulsen and *E. A. Morling*, for appellant.

J. W. Sandusky, Smith & O'Connor, M. E. Geiser, Clary & Condon, and *R. Feyerabend*, for appellees.

GAYNOR, J.—This is an action in equity for an accounting. The first petition filed was based upon the claim that the plaintiff and defendants were a co-partnership for the purpose of promoting a railroad in the state of Texas. An amendment was filed to this petition after some of the evidence had been taken, and this amendment seems to base a right for an accounting upon the theory that these parties had entered into an agreement for a joint adventure for the construction of a railroad in the state of Texas, or if not a joint adventure, an employment of agency was created and agreed to between the plaintiff and the defendants.

The plaintiff claims that, by his own efforts and expendi-

ture of time and money, he had acquired information touching the expediency and feasibility of constructing a railroad in the state of Texas between certain points; that he invited the defendant Lanin, to assist him; that Lanin accepted the invitation and that they were to share the fruits of the enterprise together; that they afterwards employed Springer in the matter and he also accepted and entered into the enterprise to assist in the prosecution of it; that the three were to share the profits of the enterprise; that the expenses of the parties in the enterprise should be mutually shared, or paid out of such enterprise; that there was, at that time, a general demand for a railroad connecting the towns of Sterling City, Carlsbad and Water Valley in the counties of Sterling and Tom Green, and it is claimed by the plaintiff that the inhabitants of these communities to be served by this railroad were willing to pay large sums in aiding the construction, and were willing to furnish a right of way free of cost; that all this, plaintiff had discovered before he came in contact with these other parties; that he had made a personal investigation of the situation at his own cost and expense, and had interviewed the leading and influential citizens of that community, from whom he had secured promises of aid in donations and free right of way; that thereafter, it was verbally agreed between the plaintiff and the defendant Lanin that they would undertake to promote the construction of the railroad and that they would unite their services and efforts in such enterprise; that they would jointly visit the territory and would proceed at once to make definite arrangements for procuring the right of way and the bonuses for the construction of the railroad; that, in pursuance of such agreement, plaintiff and Lanin visited the territory and attempted to make arrangements with the citizens of Carlsbad and Sterling City for the payment of certain bonuses, and for certain rights of way for the contemplated road; that, in pursuance of said arrangements they visited said towns, but were unable to secure favorable recognition

from the citizens of San Angelo, a town to be affected by the road, and the matter was temporarily dropped; that, afterwards, the plaintiff visited the community and revived the interest in the road and obtained favorable assurance from the citizens, and got an agreement from them that if he and his associates would construct a railway, they would pay a bonus, together with the right of way; that plaintiff returned and visited Lanin again, and they jointly renewed their efforts and procured certain agreements from the citizens looking towards the construction of the road; that, by the terms of the agreements so made orally with the citizens, a right of way was to be furnished, and a cash bonus paid when trains were in operation upon the road; that, thereafter, it was jointly agreed between plaintiff and Lanin that in order to prosecute the enterprise it was desirable to take in the other defendant, W. J. Springer, and he was accordingly taken in, and he became associated with the plaintiff and Lanin in the promotion and construction of the road, and it was jointly agreed between the three that they would undertake to promote the construction and that they would use their services and efforts to that end, and would proceed at once to make definite arrangements for carrying out the enterprise, which was accordingly done; that plaintiff thereafter procured all necessary information with reference to the building of the grade, and laid such information before the defendants; that the information which plaintiff acquired looking to the building of this road was through his own effort and the expenditure of his money; that thereafter Lanin and Springer conceived the fraudulent purpose of excluding the plaintiff from further participation in the enterprise, and of appropriating to themselves the business and fruits of the enterprise, and thereafter proceeded on their own account to negotiate with a certain railway company to sell to it their interest and rights in the enterprise, and to that end associated with themselves the defendant, Shaffer, without the knowledge or consent of the plaintiff, and did, thereafter, sell and transfer all the

rights and interests acquired in the construction of the road, but concealed from the plaintiff the amount received therefor, but the plaintiff alleges they realized large profits, not less than \$30,000.00; that plaintiff has received nothing from said enterprise; that he expended in all the sum of \$370.00 of his own money in connection therewith. Plaintiff says that there was never any express agreement between the plaintiff and the defendants, Lanin and Springer, as to the proportion in which the plaintiff and the defendants should share the profits of said enterprise, but alleges that they were co-adventurers therein, and that the plaintiff is entitled to payment of his expenses, and to an undivided one-third interest of the profits arising therefrom, and asks that any share that Shaffer may have in the enterprise be paid from the portion that would otherwise go to Lanin and Springer.

Defendant Shaffer filed first a general denial. Lanin and Springer answered, denying every allegation of plaintiff's petition in so far as he seeks to fix a liability on these defendants for an accounting. Shaffer filed an amendment to his answer, disclaiming any knowledge of plaintiff's interest in the adventure previous to the time the deal was consummated; denies that he had any knowledge of plaintiff's connection with the matter prior to entering into the partnership with the other defendants. Says that he would not have entered into it if he had known of plaintiff's claim; that he expended money and time in pursuit of the purpose, and further says that, if plaintiff had any interest in it, he permitted the defendants to go on and form a partnership with him and to control the enterprise, with the apparent right to dispose of the alleged interest of the plaintiff; that in May, 1909, he formed a partnership with the other defendants for the promoting and building of the railroad, without any knowledge of any interest of the plaintiff therein; that the plaintiff knew that this defendant was expending time and money in the prosecution of the said enterprise, and in no way noti-

fied this defendant of any alleged rights or claims which he had thereto, and says that he is now estopped.

Upon the issues thus tendered, the cause was tried to the court and judgment and decree entered for the defendants, dismissing plaintiff's petition. From this, plaintiff appeals.

The appellant's first contention is that Lanin and Springer sustained fiduciary relationships to him, in that they were co-adventurers or co-partners with and joint promoters with him in the enterprise here under consideration. This is a question of fact.

So far as this controversy is concerned, it is immaterial whether we treat the parties as co-adventurers or as co-partners. In either event, each would be the agent of the other. While it is true that, at common law, co-adventurers in an enterprise were recognized in courts only when the element of partnership was disclosed, and upon proof of the essentials of a partnership, this is not the law at the present time; and, although courts in modern times do not treat a joint venture as identical with a partnership, it is so similar in its nature and in the contractual relationships created by such adventure that the rights as between themselves are governed practically by the same rules that govern partnerships. As some of the courts hold, while a partnership is ordinarily formed for the transaction of general business of a particular kind, a joint adventure, as a rule, relates to the single transaction, although it may comprehend a business to be continued for a period of years. See *McCreery v. Green*, 38 Mich. 172; *Alderton v. Williams*, 102 N. W. (Mich.) 753; *Knapp v. Hanley*, 108 Mo. App. 353 (83 S. W. 1005); *Felbel v. Kahn*, 29 N. Y. App. Div. 270; *Derickson v. Whitney*, 6 Gray (Mass.) 248; *Field v. Woodmancy*, 10 Cush. (Mass.) 427; *O'Hara v. Harman*, 14 N. Y. App. Div. 167; *Bradley v. Wolff*, 40 Misc. (N. Y.) 592 (83 N. Y. Supp. 13).

In a joint venture, as in a partnership, fiduciary rela-

1. JOINT ADVENTURES: rights, duties and responsibility of participants: evidence reviewed.

tions are created between the parties entering into the enterprise. It is also settled by authority that, as to joint ventures, if no date is fixed by the contract for their termination, the agreement remains in force until the purpose is accomplished, and neither party can end it at will by notice or otherwise. *Green v. Higham*, 161 Mo. 333 (61 S. W. 798); *Hubbell v. Buhler*, 43 Hun. (N. Y.) 82.

It is also held by authority that, where the undertaking involved in the adventure is based upon certain estimates which require expenditure of money and time, and it afterwards develops that without fault of either party more money and time were required than contemplated, to render the enterprise successful, either party may withdraw from the adventure without becoming liable to the other. See *Hart v. McDonald*, 28 So. 169.

These principles are somewhat summarized in 23 Cyc. at page 455, 3d subdivision of a treatise on joint adventures, in which it is said: "Persons united for a common purpose must be loyal to that purpose and each other. None may, without the consent of all the associates, appropriate to his own use the common property, or by any dealing therewith secure an unfair advantage over those interested with him. An advantage or profit secured by one inures to the benefit of all. He must account for a profit . . . on a sale negotiated by him . . . An appropriation of the common property to individual use constitutes conversion, or creates the relation of debtor and creditor between the parties. . . . Parties to a joint adventure have the power and interest of a partner, as to the disposition of the property. A majority vested with full power to determine the scheme for the disposition of the common property becomes the agent of and binds all by its acts."

Where services are to be rendered by one party to the joint adventure, in consideration of a share of the profits of the enterprise, and such services are rendered, he is entitled to recover the value of such services, and may compel an ac-

counting in equity to that end. See *Matthews v. Kerfoot*, 64 Ill. App. 571; *Edson v. Gates*, 44 Mich. 253.

Where a joint venture has been entered into by mutual contract of the parties, each party must perform the services which the contract requires of him to be performed, and if he fails, he is chargeable with the expenses incurred in employing others to perform the services, to be deducted from his share of the profits. See *Dow v. Darragh*, 48 N. Y. Super. Ct. 138.

It is also held that one who fails or refuses to contribute toward the adventure before any part of the undertaking is accomplished cannot claim any interest in the profits derived therefrom, or in the property subsequently acquired by his associate individually and with his own funds. *Yeager's Appeal*, 100 Pa. St. 88; *Miller v. Butterfield*, 79 Cal. 62, 21 Pac. 543.

It is apparent that, if plaintiff's contention is true, if we can find support for his contention in this record and can say from it that the plaintiff and the defendants, Lanin and Springer, entered into a joint adventure, looking to the construction of this road, with the understanding that the adventure should be carried forward by them jointly and that each should share in the profits, and that such adventure was undertaken by them, then each became bound to the exercise of the best faith in the promotion of the enterprise; that fiduciary relations were created by the contract, which neither party could repudiate without the consent of the other, or without proof of an abandonment of the enterprise by the other. One party to the enterprise cannot abandon the enterprise for the others though he may abandon it for himself.

It is true that, if the record discloses that the plaintiff acquired all the information relating to the enterprise, and in confidence conveyed such information to Lanin and Springer, with a view of securing their efforts in a joint enterprise with himself in the building of the road, and that they entered with him into such enterprise, they would be disquali-

fied to acquire interests which would be antagonistic to the plaintiff, or which would hinder him in accomplishing the object for which he imparted such information. See *Trice v. Comstock*, 121 Fed. 620; *Phyfe v. Wardell*, 5 Paige Ch., 268; *O'Neill v. Otero*, 113 Pac. 614.

This brings us to the record before us to inquire and determine therefrom whether or not Lanin, Springer and the plaintiff did enter into a joint venture looking to the construction of this road. Until this be found in plaintiff's favor, until it affirmatively appears that these parties entered into a joint enterprise substantially as alleged by the plaintiff, there is no occasion for us to consider what the duties would be had such relationship existed. The duties which the plaintiff claims these parties owe to him rest entirely upon the initial proposition that they were engaged in a joint enterprise with him in the promotion of this road.

It is true that it is not necessary that there should be a specific formal agreement to enter into a joint enterprise, or that the interests of the parties should be definitely settled in such agreement, or that there should be a formal agreement as to sharing in the profits. If there be a joint enterprise proven, either by direct evidence of a mutual agreement to that end or by proof of facts and circumstances from which it is made to appear that such enterprise was in fact entered into, the law fixes their rights. See *Jackson v. Hooper*, 76 N. J. Eq. 185 (74 Atl. 130); *Jones v. Walker*, 101 N. Y. Supp. 22; *Ross v. Willett*, 27 N. Y. Supp. 785 (76 Hun. 211), in which it is held, in substance, that a joint venture may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for a mutual benefit and have a right to demand and expect from their associates good faith in all that relates to their common interest. It is a sort of a limited partnership as to its scope and duration, and is governed by the same rules as partnerships. See *Nebraska Power Co. v. Koenig*, reported in 139 N. W. (Nebr.) 839.

As supporting the proposition that, where parties are shown to have been engaged as co-adventurers in a joint enterprise, fiduciary relationships exist, and that each party is bound to the best faith, and that each acts for the other the same as in cases of strict partnership, see, in addition to the above cases, *Bispham Equity*, Section 93; *Trice v. Comstock*, 121 Fed. 620 (61 L. R. A. 176); *Nebraska Power Co. v. Koenig, supra*; *Grumley v. Webb*, 44 Mo. 444 (100 Am. Dec. 304); *Rose v. Hayden* (Kans.) 10 Pac. 554; *Walker v. Bruce*, 97 Pac. (Colo.) 250.

Plaintiff, in his petition touching the alleged joint enterprise or adventure, alleges that he visited the territory in question in February, 1909, in the prosecution of his personal business, and there discovered that there were several thriving towns in the counties of Sterling and Tom Green, which were wholly without railroads; that there was a pressing demand for railroads connecting the towns of Sterling City, Oralsbad and Water Valley with San Angelo, a station on the A. T. & S. F. Railroad; that the citizens who would be benefited by the construction of such road were willing to pay large sums in aid of such construction, and were willing to furnish rights of way free of cost, and that such line of road would be desirable and profitable property, and that the promotion and building would be a profitable enterprise. That he thereupon visited and communicated with many influential citizens and secured from them a promise in the form of cash donations and free rights of way; that thereupon he orally promised the citizens that he would take up with his associates the matter of constructing the road between said towns and would procure such associates to visit said community, with a view of entering into definite arrangements for the building of the road; that on or about the 15th day of March, 1909, in pursuance of the foregoing understanding with the citizens, he interviewed these defendants, Lanin and Springer, and informed them of the conditions and of the enterprise in which he desired to embark, and verbally

notified Lanin and Springer to associate themselves with him in the prosecution of the enterprise; that they verbally agreed with him that they would jointly undertake with him to promote the construction of the road, and that they would unite their services and efforts in such enterprise, and that they would jointly visit the territory and would proceed at once to make definite arrangements for procuring the rights of way and the bonuses; that, in pursuance of such arrangements, plaintiff and defendants, Lanin and Springer, visited such community, but were unable to procure favorable consideration of their proposition to build, and the matter was temporarily dropped; that later, in April, 1909, plaintiff visited the territory alone and revived the interest in the enterprise. He returned to Iowa, invited Lanin and Springer to join him, and thereupon it was verbally agreed between them that they would jointly renew their efforts in the promotion of the enterprise and would again visit the territory; that in pursuance of such later arrangement they all visited the territory and did procure definite oral agreement from the citizens to donate cash to the enterprise to the amount of \$118,000.00, and further donated a right of way; that this was procured by the joint efforts of plaintiff and defendants, Lanin and Springer; that by the terms of said donation, the right of way was to be furnished immediately and the cash bonuses were to be paid when trains were in operation upon the road; that later this oral agreement was reduced to writing. Thereupon, it was verbally agreed between the plaintiff and Lanin and Springer that they would interview the managing officers of the A. T. & S. F. Ry. Co. They did visit said officials and then it was agreed between plaintiff and Lanin and Springer that they would undertake to arrange for the construction of the grade; that, in pursuance of such agreement, plaintiff investigated and procured information with reference to the building of the grade, and that such information was laid before the defendants, Lanin and Springer; that there was never any express agreement be-

tween the plaintiff and the defendants, Lanin and Springer, as to the proportion in which the plaintiff and said defendants should share the profits of the enterprise, but alleges that, by reason of the premises aforesaid, they became and were co-adventurers in such enterprise.

The plaintiff, in an amendment to his petition, alleges that it was the understanding and agreement between them that their expenses and the expenses of all the parties in the prosecution of the enterprise should be mutually shared or paid out of the proceeds of the enterprise; that up to the time that Lanin and Springer conceived the fraudulent purpose of excluding the plaintiff from further participation in the enterprise, they were acting as the agents of the plaintiff, as well as of the three jointly, in the prosecution of the enterprise, and so held themselves out to the plaintiff, and so conducted themselves as to lead the plaintiff to so believe, and the plaintiff did believe that they were acting for and in behalf of himself as well as themselves in the joint venture; that Lanin and Springer betrayed their trust and appropriated to themselves the plaintiff's business, and the fruits of the enterprise and of his labors and expenditures.

It appears from the record that one Gardner, who lived in Waterloo, Iowa, owned, or had an option on a large tract of land to be beneficially affected by the construction of this road; that he had this land for sale in the market; that plaintiff, John T. Goss, E. E. Brady and G. E. Brebner were in the real estate business and were the agents of Gardner in the disposition of this land, and were selling it for him on a commission. The company in which Mr. Gardner was interested was known as the National Realty Company. It appears that in February, 1909, plaintiff, Goss, was in the vicinity of this land of Gardner's and discovered not only a demand but a necessity for a road such as he says was contemplated in the joint venture, and plaintiff says that Gardner was interested in the building of this road to the extent that, if the road was built, his (Gardner's) land would sell much

easier. Gardner's interest in the deal seems to have been to that extent active, and, we assume, one of the moving causes of Goss's activity at that time.

There can be no question from this record that Goss at this time was very active in seeking to promote the building of this road. It appears that he talked with the citizens of Sterling City on his first trip, and sought to interest them in the building of a road. He made, however, no definite arrangements, but had suggestions of bonuses and rights of way. He interested men who had either public or private interest in the construction of this road. That these men with whom he talked desired to carry out this enterprise is apparent. Goss claims that, when he discovered that the people of the community were anxious for a road and were willing to contribute something to its building up, he told them that he knew a man who was familiar with that line of work, a brother-in-law of his, J. J. Lanin, the defendant herein, and that he would bring him down, and told them, as he says, that he and Mr. Lanin would build the road if proper arrangements for bonus and right of way could be made. This was, he claims, about the last of February, or the 1st of March, 1909. He claims that when he came home he talked with Lanin about it, and with several other fellows around Waterloo and New Hampton; that Lanin and he were, at that time, working land business together. He claims that, on or about the 15th day of March, 1909, they started from New Hampton in a private car with Mr. Brady, Mr. Gardner and Mr. Brebner. He says that the occasion of their going down at that time was that they had a party of land seekers who were going down to look over the country, possibly to buy land. Gardner furnished the private car. Gardner was interested in the land down there. He was making up a party of land seekers. This is the first time Lanin went down. He introduced Lanin as a promoter and builder of railroads. Lanin was his brother-in-law. He told them that Lanin was there to enter into a deal to build this road; and he

talked with many people who were interested in the construction of the road. Had public meetings. Called at the banks and tried to interest the bankers. Got a promise from certain parties to contribute certain sums to the enterprise. After Lanin had examined the matter and had been conspicuously introduced as railroad promoter and builder, he was greatly pleased and said the thing to do was to go back home and organize and come down again and meet the clubs. Lanin thought it would be advisable to go home, consult an attorney and come down and meet these people and get them to make definite offers of bonus and then the road might be built. They figured on the cost of building the road, the cost per mile to grade, what the steel would cost, etc. After they got home, they decided to go down again. Arranged to have a Mr. Sullivan of Waterloo to go along with them to take care of the legal side of the question. On this trip Mr. Gardner also went. Sullivan was Gardner's attorney. They had meetings with the citizens. The people were not prepared to make a proposition. They had not taken any action with reference to that, but expressed themselves as willing to do the right thing. "I asked them for a fixed bonus of \$100,000.00." This was at San Angelo. He claims that they had definite assurance from the other towns, but the committee of San Angelo turned the proposition down. When they returned from this trip, he claims there was some talk about interesting the Santa Fe Road in the enterprise, and about putting the proposition up to Mr. Ripley, the president of the road. At this time, there had been some talk about bringing in W. J. Springer. Lanin suggested this, and Lanin suggested that Springer would be the man to send to Chicago to interview Mr. Ripley. He said, "I afterwards met Springer and talked the matter over with him and explained it in detail. Talked about the matter of going to see Ripley. I didn't know Ripley at all. Only knew he was president of the Santa Fe. We all agreed that Springer should be taken in." Springer first required that his expenses be paid to Chi-

cago. He said that if he took hold it was necessary that he have his expenses advanced, but plaintiff claims that he told Springer that he wouldn't advance any expenses. Brady was present at this conversation. Springer went to Chicago and after he returned, he took up the proposition with reference to his meeting with Ripley. He said it was favorable. "When Springer returned, Mr. Brady, Mr. Gardner, Mr. Lanin and myself were present with Springer, together with Mr. Brebner. This was about May 8, 1909. The proposition to Ripley was, that they would put in the road bed and turn it over complete and that Ripley was favorable to the purchasing of it." It seems that none of the parties had any money to be invested in the enterprise except Gardner, and Gardner was not willing to put any money in. They talked about financing the road, that it was necessary to get \$18,000.00 or \$20,000.00 to go ahead with the deal, to put in the road bed; that it would be necessary that they interest outside capital in order to go on; that they consulted with several capitalists. He claims that he also met a man by the name of Elsie, a large contractor, and made a proposition to him to put on the grade. He says that he explained to Elsie that he should be taken in as a partner on the bonus money, or, in other words, that he would get \$50,000.00 for putting the grade on; that this would come out of the bonus money, and then on the profits, he would be in on that too. He said, "After this, I wrote to Mr. Lanin at Devils Lake, North Dakota, and I explained the audience with Elsie and told him that Elsie was willing to go in if we could show him that Ripley would do his part, and asked him to come and see me and we would arrange with Elsie. The next I heard of this proposition was when I was down at Sterling City and saw Lanin, Springer, and Shaffer there on this road deal."

Goss further testified in substance that on the 6th day of May, 1909, Lanin wrote him a letter in which he said that he had taken the railroad matter up with Springer, and that Springer said that if Gardner wants to put up \$20,000.00, he

will get it back when the line is finished; that he thinks that Gardner's land will sell at a much better price, and that he won't lose anything; that his expenses will have to be paid from here and back; that he said that he had spoken with Springer about plaintiff's proposition, and that he thought it was all right and to go ahead; that he would go to K. C. and see Stillwell, if the President of the Santa Fe would answer his letters, and then stated, "Now if you can get Gardner to do this, we will go ahead and put this deal through, and then we all can make some money. If not, we might just as well drop it; that Springer was the only man that could handle the deal and make it a winner, and that he would suit Gardner and yourself and Brady. It is up to you (meaning Goss), to see whether this goes through or not. You started it. Keep the people in Texas on the string anyway. Telegraph Graham and see what he has to say. Tell him we are going back to put through the road. See Mr. Gardner and tell him all we want is enough to get a start. We must know at once. I got Brady's message."

Goss says, "When I received this letter from Lanin in which he asked Gardner to put up \$20,000.00, I talked with Gardner about it. He wasn't inclined to go into the deal if we turned down Mr. Sullivan. He said nothing about his ability to produce the money. I took up the matter of assisting in promoting this enterprise with a contractor at Marshalltown. This was about the 24th of May."

On cross-examination, he stated, "It was in the early part of May I made definite arrangements with Lanin and Springer to put that project through down there. We then made a definite arrangement that we would go in together and put this enterprise through. The first I knew that Shaffer had connection with the enterprise was when I saw him in Texas in the early part of June. I saw the other two defendants there also. I didn't talk with Shaffer about the railroad project although I knew what the three

were there for. I didn't have any conversation with Shaffer at all. Neither myself, Mr. Lanin or Mr. Springer had any means at the time to construct a railroad or to construct the embankment or grade of a road. We had no financial means. The last time I was in Texas with Mr. Lanin was in April. At that time Sullivan and Gardner were along. During these negotiations I talked with a Mr. Marsh about putting some money in. I assured him we could get the deal through if we had money to get the grade started. Mr. Gardner was interested to the extent that he wanted to see the railroad built for the reason that it would give his prospective buyers to understand that they would have a railroad close to the land. He had the exclusive option on the land. He had a lot to say about spending money trying to sell. Mr. Gardner was very anxious that this railroad be built and encouraged me to go ahead and do what I could and informed me that if I wanted any help he would lend me all the assistance possible. My connection with Mr. Gardner was that I was soliciting buyers for his Texas land, and in the event of sales I was to get a commission."

Brady testified for the plaintiff: "Mr. Goss went to New Hampton and met Mr. Lanin. He was soliciting land over there, getting buyers for Texas. I didn't meet Lanin until I met him in Texas. This was sometime in March. On the train that took us down there was Mr. Goss, and his brother, several others from New Hampton, myself, Mr. Gardner and Mr. Brebner. I went to New Hampton with Mr. Goss. It was sometime in May. Mr. Lanin said to me and Mr. Goss that they wanted expense money to carry on this, to pay their expenses for going down to Texas and looking after promoting this road. Mr. Goss said there was nothing doing in any way of expense money. Lanin said he had a talk with Springer about the railroad matter. On that day I also met Springer in his office. Both Lanin and Goss were there. There was conversation at the time in regard to this railroad

proposition. Mr. Goss made the proposition to Mr. Springer in regard to somebody's building this road. Mr. Springer stated that there was an attorney who was a good friend of his, and he could get a hearing with Mr. Ripley, the president of the Santa Fe. Springer went to Chicago and after he returned he said he had met Ripley. Had a nice interview and Ripley said that if they got the right kind of contract in Texas that he would equip the road with steel and ties and put on a train. There was talk about raising money to finance it. Some talk about getting Gardner to put in the money. There was some talk about interesting a railroad contractor in the enterprise."

Most of Brady's testimony appears to be what Goss told him.

Brebner, called for the plaintiff, testified substantially the same as Goss and Brady to the effect that Goss had visited Texas and the vicinity of the proposed road some time before March, 1909, and came back enthusiastic over the proposition to put in a road. He mentioned several parties who he thought might be interested, but in different ways. He mentioned his brother-in-law, Lanin, a good man to promote, and one Marsh, a good man who might finance it. "At this time I had not met Lanin. In March we took a trip to Texas. In the party were Goss, Lanin, Brady, Gardner and myself. We were taking land buyers into Texas. That is, the National Realty Company was taking land buyers to Texas. When we got there, Goss introduced Lanin to several parties. Mr. Lanin was represented as being a railroad promoter, and it was represented that he was there for the purpose of interviewing parties with that purpose in view. When we got ready to return, Goss wanted Lanin to remain, but Lanin wouldn't remain without Goss. Goss then remained. I heard conversations after that in the office of the National Realty Company. I heard conversations with relation to this road matter. The conversation was between Mr. Goss and Mr.

Lanin, Mr. Springer, Mr. Gardner and Mr. Brady. The talk was that the railroad could be put through but the principal obstacle in the way was that of financing it. I commenced working for the National Realty Company in 1908, as general office man, keeping the books, etc. When I went down to Texas in 1909, I went for the National Realty Company. Most of the persons who went were prospective land buyers."

Sullivan testified for the plaintiff that the first time he met Lanin was on the trip to Texas in March; that it was understood that Lanin was to pose as a railroad builder and contractor. "

It was understood that each one was to be lined up for a part. Lanin was to be the man who was to look over the ground for the purpose of taking the contract for building the road. The people down there understood that Goss was to bring some people to build this road, provided the proper bonuses could be had. A public meeting was called. Lanin made a statement which created trouble. He said that he had nothing to say, no statement to make because the people wouldn't be able to fulfill their contract. After the thing got quieted down, Sullivan made a speech explaining Lanin's attitude, and saying that Lanin meant by what he said that he couldn't make any statement until a definite proposition was made by the citizens. "I was taken down there for the purpose of addressing these meetings, and for the purpose of looking over the situation, and was given an opportunity, if desired, of becoming one of the promoters. Goss gave me my ticket for transportation."

Gardner, called for the plaintiff, testified: "Mr. Sullivan was asked to go down on this trip in March by Mr. Goss and myself. I was interested in seeing it go through. They were asking me to put up some money in order to assist them. I objected to Mr. Springer's taking Mr. Sullivan's place. I was always interested in seeing the road go through as it would enhance the value of our land. I did not know as to

whether I had any interest in the business profits that there might be from promoting it. I thought if there was a profit in it, we would all participate. There was some conversation early in this deal in which Mr. Springer wanted me to advance \$500.00 as a fee. That was talked over. My understanding was, that it was a retainer fee. They wanted that as retainer before he began. Mr. Goss talked with me about advancing \$500.00 and if I recall, Mr. Lanin was present. I am quite sure there was some question made of a \$500.00 fee when Lanin and Goss were present. That was at the time there was talk of taking Springer in. That was the time Lanin was trying to get Springer into the deal. This was before Springer went to Chicago."

It will be noticed from all this testimony that in nearly every conversation referred to by the witnesses, Gardner, Brady and Goss were present, sometimes Brebner and sometimes Sullivan; that all these parties, in one capacity or another, represent the National Realty Company; that the National Realty Company were the owners or had options on large tracts of land to be affected by the proposed railway. The apparent interest of Brady and Gardner and Sullivan, and we think Goss, was to secure the building of this railway for the purpose of enhancing the value of the real estate controlled by Gardner as the representative of said company; that Goss was interested in the sale of this land, as was also Brady; that the building of a railroad would have the effect of making these lands more valuable, more marketable, and, therefore, bring a benefit to these promoters.

In viewing the situation as presented by the plaintiff's testimony, we must look at it from the standpoint of the probable motive which prompted the interest and activities of these parties; the purpose they had in view in what they did and what they said; the end that they had in mind in the promotion of this road. Each of these parties had the same knowledge of the conditions existing there, and of the advan-

tages to be derived by themselves and the citizens from the construction of a road at the contemplated point. All took an active part in an effort to secure someone who would assume the responsibility and the hazards attending such an enterprise. None of these parties, however, were willing to contribute any financial aid to the success of the enterprise. Gardner, while he desired the road, evidently did not feel confident that there would be profit to the investors in such an enterprise. Goss was in close touch with Gardner. He knew Gardner's mind and Gardner's purpose. He was working for Gardner's interest. This is shown by his own testimony. They sought to interest many parties other than these two defendants in this enterprise. Nothing definite came of any of the interviews, and no financial aid for the enterprise was secured by any one of these parties at any time. They were asked to contribute to the expense of investigating the matter, and to the end that some definite contracts and arrangements might be made to insure its success. This was declined.

It is not claimed by any witness that any definite arrangements were made, either in word or by act, between Lanin, Springer and Goss, that they should, in fact, or that they had, in fact, entered into a joint adventure looking to the construction of this road. The most that the testimony reveals on this point is an assumption on the part of Goss and his witnesses that such an arrangement had been made. It rested on no substantial basis disclosed by the evidence. The most that can be claimed is that there was talk as to investigating the feasibility of such an enterprise.

The plaintiff claims that the arrangement, if made at all, was made about the first day of May, 1909, soon after the meeting with Springer, and that Springer's trip to Chicago to visit Ripley was made in pursuance of the contract to enter into a joint adventure and looking to the carrying out of such adventure. The plaintiff says that on or about the first day of May, 1909, the defendant orally represented to the

plaintiff that, in order to prosecute the enterprise successfully, it would be desirable to invite in the defendant Wm. J. Springer to be associated with them in said enterprise, and at the special instance and request of the defendant Lanin, on or about said date, they invited Springer into the enterprise and to become associated with them in the promotion and construction of the railroad, and that the defendant Springer verbally agreed to associate himself with the plaintiff and the defendant Lanin in the promotion and carrying out of said enterprise, and it was verbally agreed that the three would jointly unite to promote the construction of said road, and would unite their services and efforts to that end, and would proceed at once to make definite arrangements for the promotion of the road. Yet plaintiff claims that after that he invited Elsie in and promised him a share in the profits; that he invited a contractor at Marshalltown to come in and share in the profits.

On the 24th day of May, the plaintiff wrote to the defendant Lanin, addressed to him at Devils Lake, North Dakota, a letter in which he said, among other things, "Neither Springer nor Sullivan are anxious to go into the deal and take any chances. Neither of them want their names mentioned until they are sure it is a go. The fact is, they both want someone out on the advance line to take the blunt of everything, and if it pans out all right, they are ready to take the money and if it falls through, they are protected." From which it is apparent that at that time the plaintiff did not consider that definite arrangements had been made between himself, Springer and Lanin to carry on the joint enterprise for their joint benefit. In that same letter, he mentions Gardner as interested in the deal but unwilling to finance it. He mentions Brady as though he considered Brady entitled to something out of the deal, and then winds up his letter by saying, "Now there is no use talking, I propose to be in on this money business, if it goes through, as I am the man who got this going. If I can deal with the contractor

(meaning the contractor at Marshalltown), I can do business without the Santa Fe being in at all."

This seems to be the last transaction or communication that Goss ever had with any of the defendants, or with a view to promote the project.

It appears that soon after this letter was received by Lanin, he received a telegram from Springer and returned to Iowa, and for the first time found that Springer had secured Shaffer, the other defendant, to finance the deal; and, on the 28th day of May, the defendants entered into an agreement of co-partnership for the purpose of promoting this road. The agreement entered into was in writing. It defined the object and purpose for which they associated themselves together; assigned to each a definite work and a definite position in the partnership; that all contracts entered into, all money paid to carry out the project, should be approved and concurred in by all the parties. Shaffer agreed to finance the deal and agreed to furnish \$20,000.00 in the event satisfactory agreements were made with the Santa Fe to take over the road when completed.

It appears that no definite arrangements had been made with the Santa Fe looking to that end, up to that time. After the contract was entered into, Springer, Shaffer and Lanin went to Texas to look over the project and determine the advisability of entering into the prosecution of the work; that while down there they met the plaintiff. Plaintiff was introduced to the defendant, Shaffer. He knew what they were there for and made no objection and no complaint. They were there probably, at that time, about two weeks. Shaffer advanced all the expense money.

There is evidence that, when Springer was first approached with this proposition, he said that he would not go into it with those other parties, and wouldn't go to Texas for them or with them, unless there was \$500.00 put up to cover the expenses. There is evidence of the fact that Springer said, at the time that he was approached with this proposition,

that he wouldn't go into the proposition of promoting the road there at all until he had gone to Texas and investigated the situation, and that he wouldn't go and do this unless his expenses were first secured. There is evidence that the plaintiff never mentioned to Springer anything touching his attempted relationship with Elsie, or the contractor at Marshalltown.

There is evidence that, when Springer said that he would not go to Texas to investigate the matter unless his expenses were paid, it was understood then that Brady and Goss would furnish the money; that they never sent the money; that the plaintiff, after the conversation with Brady, said, "We cannot raise the money. The deal is off," and Lanin said, "All right, I am going to North Dakota," and he went.

There is evidence that Springer never receded from his position and statement that he would not go on and investigate the matter or engage in an investigation until expense money was advanced. There is evidence that no definite agreements were made either for rights of way or bonuses with any of the parties in Texas, interested in the construction of the road, at any time prior to the organization of the defendants' partnership.

There is no evidence that the plaintiff or anyone associated with him, prior to the organization of the defendants' partnership, ever made any definite arrangements with the citizens or committees in Texas interested in this road, looking to its construction. There is evidence that plaintiff never contributed anything of his own to the financial support of the venture; that no one was procured by the plaintiff to give the venture financial support. There is no evidence that he did, there is substantive evidence that he did not, seek to assist, by his own efforts, or by the contribution of financial support, the perfecting of the deal in securing contracts and rights of way; that although he knew that the defendants were engaged in that enterprise in Texas, he made no offer to assist and made no complaint of their attitude. After the deal was

consummated, he procured Mr. Sullivan, the attorney, to write Lanin touching his (Goss's) interest in the deal. There is no doubt that this letter was written at the instigation of Goss, although he disclaimed the attitude in which the letter places him. The letter is as follows.

"Waterloo, Iowa, Oct. 2, 1909. Mr. John Goss and Jean Brady of this City have placed their claim of \$5,000.00 against you with me with instructions to commence suit upon the same. They advise me that they had an understanding with you that you were to pay the \$5,000.00 for their services in the promotion in the line of railway from San Angelo, Texas, to Sterling City, and they advise me that you have failed to pay the same according to your contract, and unless you forward me draft for this amount, I will commence suit for collection of same.

"I also hold a claim myself for \$700.00 for legal services against you in assisting in the promotion of this railway and assisting in getting bonus subscription in San Angelo, Water Valley, Sterling City and Karlsbath. Kindly also forward me draft for \$700.00 to cover amount of my bill for services. Please give this matter your prompt attention and save costs."

This letter would indicate the mental attitude of Goss towards the proposition, as he understood it, at the time this letter was written; and it is apparent that he did not then consider himself as a joint promoter or as a co-partner of these defendants. It seems that he then thought that he was entitled to compensation for the services which he rendered, in connection with Gardner, Brady, Brebner and Sullivan, in their early visits to Texas, in which they sought, by their individual efforts, jointly to create a sentiment in favor of the construction of this road; for Sullivan, who evidently understood Lanin's connection with the enterprise and who aided him in the work in Texas, also made claim for \$700.00 for services rendered in getting bonus subscriptions.

It is true that, if we accept the theory now advanced by

the plaintiff, this is not a fair construction of the meaning of the letter; but we cannot escape from the conclusion, from a reading of this whole record, that it was never Goss's purpose to place himself in a position where he would be financially responsible for any failure that might attend the enterprise. He seemed to occupy the position in which he said in his letter of May 24th, he found Springer—"He wants someone on the advance line to take the blunt of everything. and if it pans out all right, he is ready to take the money, and if it falls through, he is protected." His theory seems to have been that he proposed to be in on the money business if it goes through, but didn't propose to bind himself to any financial obligations.

Much of the testimony in this record consists of conclusions rather than facts; statements made based upon no personal knowledge of the facts stated; conclusions drawn from inferences as to the existence of facts, rather than from a knowledge of the existence of facts.

We are satisfied, from the whole record, that there was no co-partnership between the plaintiff and Lanin and Springer, and we are further satisfied that they never entered into a contract for a joint adventure in the enterprise; that plaintiff has no standing in court, either as a co-partner or as one engaged in a joint enterprise; that he played a waiting game, if, peradventure, he ever had in his mind at the time the thought of reaping profits from the joint venture. His whole conduct is inconsistent with the theory upon which he predicates a right to recover in this suit. "Heads I win, and tails you lose."

We find no relief for the plaintiff in this record and concur in the conclusion reached by the trial judge. The case is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

I. P. HATCH et al., Appellants, v. BOARD OF SUPERVISORS et al.,
Appellees.

EVIDENCE: Hearsay—General Rule Applied. Hearsay evidence is

- 1 incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge.

PRINCIPLE APPLIED: The inquiry before the court was whether a wife had consented to the establishment of a highway through her land. A witness was permitted to testify that he had had a talk with the husband, and that the husband had told him that when he, the husband, signed the petition, his wife was present and heard the talk wherein certain promises were made by the one circulating the petition. *Held*, incompetent.

HIGHWAYS: Consent Petition—Ownership of Land—Competency of

- 2 **Evidence.** Where the record title to lands was in the wife, and it was sought to show that the husband who had signed the petition for a consent highway was in fact the owner, *held* improper, in the effort to show his ownership, to receive evidence that the husband had given in the land for assessment as the property of the wife, but stated that the real truth was that he was the owner, because (a) incompetent generally, (b) incompetent to show ownership, and (c) the proceeding being certiorari, involving whether the petition bore the signatures of the owners of land as required by statute, the court could not try out the question whether someone *other than the record owner* was the owner of such land.

CERTIORARI: Return—Supplementary Testimony—Purpose for

- 3 **Which Admissible—Highways.** Certiorari does not act as an appeal wherein cases may be tried *de novo*, but testimony beyond the return, though not offered before the lower tribunal, may, on the hearing, supplement the return, but such testimony must bear on the one narrow question, to wit: Did the lower tribunal act in excess of its jurisdiction or otherwise illegally?

HIGHWAYS: By Consent—"Written" Consent—What Constitutes.

- 4 Sec. 1512, Code 1897, provides for the establishment of highways without the appointment of a commissioner "if the *written* consent of the owners of land to be used for that purpose is first

filed in the auditor's office." To meet this statute, the owner's name must appear upon the petition. In other words, the petition must be so complete that the board of supervisors can determine therefrom that it has the written consent of such owners *without resorting to oral evidence.*

PRINCIPLE APPLIED: One Anna Blum owned the land, part of which would be taken for the proposed highway. When she was asked to sign the petition, her husband was present, and she said, "Let him sign it and it is all right." She then handed the petition to her husband and in substance said, "You can sign it for me; it will be all right." Whereupon the husband signed *his own name.* *Held,* the written name of the husband was proof of no more than oral consent by the wife and was insufficient.

Appeal from Lyon District Court.—HON. WILLIAM HUTCHINSON, Judge.

FRIDAY, APRIL 9, 1915.

CERTIORARI to review the legality of the establishment of a highway. The district court dismissed the petition, and plaintiffs appeal.—*Reversed.*

S. D. Riniker, for appellants.

Simon Fisher, County Attorney, for appellees.

SALINGER, J.—Before the board of supervisors, this was a proceeding to establish a consent highway under the provisions of Sec. 1512 of the Code, which provides that such road may be established, "if the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office." One Anna Blum was such owner, and her name does not appear on the petition filed with the auditor. It does bear the signature of her husband.

The writ of certiorari may be granted where it is alleged that the tribunal below exceeded its proper jurisdiction, or is otherwise acting illegally. Code, Sec. 4154.

In determining whether the district court held rightly

that the board had not exceeded its proper jurisdiction, and had not otherwise acted illegally, we have for solution the following ultimate questions:

1. Did the district court err in receiving testimony additional to the return?

2. Can it be shown on the certiorari hearing that the petition was materially altered without consent of the signers, and if it can, what is the effect of such testimony?

3. May it be shown, aside from the return, that some landowner did not give written consent?

4. Did the testimony admitted establish such written consent?

I. Before we are concerned with the effect of some of the testimony taken against objection, we must dispose of its admissibility.

One Anna Blum was the record owner of land which would be used if the establishment of the consent highway in controversy was not annulled. It became a controlling question on the hearing in district court whether the owner of that land had given written consent to such establishment. To support the contention that such consent was given, testimony was offered tending to show (1) that, while Anna did not sign, her husband, who signed his own name to the consent, was in truth the owner of said land; (2) that Anna directed her husband to sign his name to the consent, for which it is claimed that it amounts to written consent on her part. This testimony was taken over objections, which are broad enough to assert that (1) the court should not, on certiorari, go into the line of investigation to which this testimony was addressed; (2) such testimony was inadmissible, even if there was right to enter upon such investigation on proper testimony; (3) if it be assumed such testimony was admissible and should be considered, it fails to establish the written consent required.

a. Some of this testimony should not have been received

if it be assumed there was right to entertain the issue upon which it was offered, and though it be further assumed that proper oral testimony would have been admissible. In any view, it was error to let a witness say the husband told him the wife was present at the signing, and heard certain promises then made by one who presented the consent for signature. It is manifestly incompetent.

b. And so of testimony, in effect, that the husband gave in the land to the assessor as the property of the wife, but asserted to the assessor at the same time that the land in truth and in equity belonged to the husband.

2. HIGHWAYS: consent petition; ownership of land; competency of evidence. This was (1) incompetent, irrelevant and immaterial, generally; (2) on a hearing on certiorari involving whether the board had a petition bearing the signature of the owner of certain lands, the court could not try out whether someone other than the record owner was the owner of such land; (3) giving in land for assessment as belonging to one's wife and statements of the husband to the assessor that such land belonged to the husband is not competent evidence that the husband owns the land. It is strongly to be doubted if it would be competent evidence of his ownership had he given the land in as being his. *Adams v. Hickox*, 55 Iowa 632; *Hetch's case*, 95 Iowa at 761; 96 Iowa at 100; *Albright's case*, 103 Iowa at 105.

II. There was testimony which, it may be conceded, for

3. CERTIORARI: return; supplementary testimony; purpose for which admissible; highways. present purposes, tends to show that the wife gave consent to the establishment of this highway, and to evidence such consent, directed her husband to sign his name to the petition.

No such testimony was adduced before the board, and that question does not seem to have been there mooted. The objections made are sufficient to present whether, this being so, such testimony should have been received on the hearing.

Certiorari is tried in the district court, primarily, upon

the return made to it, and Code 4159 provides that if that return be defective the court may order a further return and compel same by attachment. By provision of Code 4160 the district court hears the matter "upon the record, proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce."

Clearly enough, this authorizes the introduction of such oral testimony as either party may elect, in addition to the record and the facts certified by return, original or amended. But it does not say to what such testimony may be addressed. We are satisfied this permits no more than the addressing of oral testimony to the question whether the tribunal in review has exceeded its jurisdiction, or otherwise acted illegally. We cannot hold that this privilege was intended to be broader than this without disregarding the clear intention of the legislature, and the clear and continuous pronouncements of the courts. Of what use is the statute provision that a return shall be made certifying what occurred below—of what use is the other statute provision that such writ may be ordered amended, and the amendment enforced by attachment—if the parties have the unlimited right, by either oral or written testimony, to furnish the proof for their entire case? Of what advantage are methods for bringing before the district court merely what occurred below, if it is permitted to disregard all that occurred there, and to prove the case as though the board had never acted?

Another statute limits review to exceeding jurisdiction and otherwise acting illegally. Beginning with the 30th Iowa, and ending in the 155th, and dealing with it in a great many of the reports between the two, this court has said, in every conceivable way, that on review by certiorari no inquiry will be made whether the tribunal in review, acting within its powers, has committed error; say, for instance, in passing upon the weight and effect of testimony.

In *Trust Co. v. District Court*, 149 Iowa, at 70, a case

which approves the rule in *Tiedt's* case, to which we shall hereafter refer, it is said:

“When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally, but if a discretion is conferred upon the inferior tribunal, its exercise cannot be illegal. If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject matter and the parties are within its jurisdiction, for the law entrusts the decision to the discretion of the tribunal.”

Of what efficacy is this statute declaration, and these constructions of that declaration, if on such hearing testimony may be adduced beyond what bears upon excess of jurisdiction or illegal act? To allow, literally, any evidence the parties see fit to put in simply turns the review on certiorari into a trial *de novo*—something which it is surely not intended to be.

When *Tiedt's* case, 61 Iowa, at 336, was decided, the statute gave even greater latitude on this point than does the present one. Yet we there said:

“This provision is not intended to extend the remedy so that inquiry may be made into matters other than the jurisdiction and the legality of the proceedings of the inferior court. It is not the purpose of the statute to change the office of a certiorari so that it will operate as an appeal, wherein causes may be tried *de novo*. The scope of the remedy is not extended; it remains restricted to questions of jurisdiction, and the regularity of the proceedings of the inferior court. It sometimes happens that the return to the writ of certiorari fails to show the facts whereon the jurisdiction of the inferior court is based, or the regularity or irregularity of the forms

of proceedings brought in question. That all the facts involved in the case bearing upon the issue in the proceedings touching the jurisdiction and compliance with the law in the case reviewed may be considered, the statute last cited provides for the introduction of evidence other than the return to the writ."

On a fair construction of all statutes in *pari materia* and the various interpretations of them, it is manifest that the only testimony other than the return which may be introduced is such as bears upon the narrow question whether the board acted in excess of its jurisdiction, or otherwise acted illegally. On this point, the testimony is admissible whether it is furnished by the original return and amended return, or oral testimony. We therefore hold that, in so far as the objections made raise the point that no oral testimony is admissible on certiorari, unless it speaks to a question which was mooted below, and in so far as they assert that the district court may not make an original and independent investigation on any subject, the objections are not tenable. And we think it was competent for these defendants to prove, if they could, by oral testimony, if they so elected, anything that tends to show that the petition contains the required written consent. To enter upon that issue is an inquiry into the jurisdiction of the board, and hence a permissible inquiry, and one which the statute contemplates in permitting oral testimony to be adduced.

4. HIGHWAYS:
by consent:
"written" con-
sent: what
constitutes.
- III. Code Sec. 1512 provides roads may be established "if the written consent of all the owners of the land to be used for that purpose be first filed in the auditor's office."

What amounts to such "written consent?"

Over apt objections, the defendants were allowed to show, in effect, that this petition was presented to Anna Blum; that her husband was present at the time; that Anna was asked to sign; that she did not sign; that the wife thereupon

said "let him (the husband) sign it and it is all right;" that she handed it to the husband, and "says he could sign it for her, and it would be all right." Thereupon, the husband signed his own name.

That this competently shows the wife consented to the road may be conceded. There is no objection, in principle, to having A bound upon his directing B to sign B's name, and declaring that such signature shall be deemed the act of and bind A. But is that a written consent, and does not the statute attach as controlling importance to the form of consent as to the fact of consent? Wherein, in substance, does the case at bar differ from what it would have been if neither husband nor wife had signed the petition? In that case, there might have been an abundance of testimony that the wife orally consented to the establishment, but it would not show her consent in writing: no writing evidenced her consent. Without oral testimony, how did the signed name of the husband furnish written evidence that the wife was bound? We think there is no escaping the conclusion that the legislature entertained a specific purpose here. It commands that the paper presented to the board for action should show without aid from oral evidence that the abutting owners consented. Any other construction lets in any and all testimony that tends to show any consent, and produces the very uncertainties which the statute attempted to avoid.

A wife's signature as a witness to a contract for the sale of her husband's real estate, she being in no way referred to in the contract as a party, is not a "written consent" to the sale, within Rev. Laws 1905, Sec. 3648, giving a wife one-third interest in all real estate owned by her husband, to the sale of which she has not consented in writing. *Stromme v. Bieck*, 107 Minn. 177, 119 N. W. 948, 950.

In *Raritan v. Veghte*, 21 N. J. Eq. 463, at 469-70, "written consent" was required from adjoining property owners to authorize the diversion of certain waters for the purpose of raising the headgate of a dam, and the court construed such

phrase to mean "the equivalent to a deed at common law, to the full extent of the interest intended to be secured."

What the effect would be if the name Anna Blum appeared to be signed to the petition when, in fact, it had been signed for her by another, upon her direction, we have no occasion to determine. We are, however, satisfied and we hold: (1) Where the name of the owner does not appear on the petition, the consent is not written. (2) Evidence that the written name of another is in fact the consent of the owner who has not signed is proof of no more than oral consent. (3) Written consent is indispensable.

IV. In view of the result reached here, there is no occasion to decide whether, in view of the fact that the petition waives damages and Anna Blum filed a claim for damages, it is proven that she gave the direction upon which defendants rely. And for the same reason, and the further one that the road seems to have been established as prayed by the petition before same was altered, we have no occasion to pass upon the effect of the alteration.

The judgment and decree below must be and is—*Reversed*.

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

JOHN KENT et al., Appellees, v. CITY OF HARLAN et al.,
Appellants.

MUNICIPAL CORPORATIONS: Streets—Hitching Posts—Ingress and Egress to Property—Nuisance. Hitching posts in public streets, while not a nuisance *per se*, may be such in fact. In instant case, *held*, hitching posts so placed as to interfere with the ingress and egress of parties to and from their private property were a nuisance and abatable by injunction.

Appeal from Shelby District Court.—HON. O. D. WHEELER,
Judge.

FRIDAY, APRIL 9, 1915.

ACTION to enjoin a nuisance. It is brought against the defendant city and the mayor thereof by plaintiffs as property owners who claim to be injured in their property by the alleged nuisance, and this consists in the maintenance of a rack of hitching posts in front of such property.—*Affirmed.*

E. S. White, for appellees.

Smith & Gunderson, for appellants.

EVANS, J.—The city of Harlan contains between 2,500 and 3,000 people. The city council authorized the construction of a row of hitching posts upon the east side of Eighth Street. This is a north and south street and

1. MUNICIPAL CORPORATION : streets : hitching posts : ingress and egress to property : nuisance. is located one block west of the principal street and the public square. Hitching posts had been theretofore banished from the public square and the principal street. Other places were sought as suitable for such purpose, and Eighth Street was selected. This street has an ordinary width of 66 feet. On the east it abuts upon the property of the plaintiff Hudson. This property is a livery stable and is built up to the lot line. The row of posts runs parallel thereto and 18 feet therefrom. The plaintiff Hudson contends that it interferes with his ingress and egress to and from his barn. On the opposite side of the street, is the residence property of plaintiff Kent, who has an entrance to his property from this street near his north line. He contends that the use of the street for hitching post purposes will interfere with his ingress and egress to and from his lot. At the north and rear end of this lot, is a public alley extending east and west. He contends, also, that the use of the hitching posts will interfere with his use of this alley. West of the residence of Kent, is a residence owned by the plaintiff Allen, who complains of the obstruction to the common alley caused by the use of the hitching

posts. On the west side of the street, Kent's parking contains a number of shade trees. The distance from the hitching post line to these trees is 37 feet. A wagon equipped with a hayrack will occupy about 30 feet of that space. This would only leave 7 feet for a passage way. Manifestly, the travel going in different directions could not pass upon such a narrow strip. Manifestly, also, this would tend to interfere with the ingress and egress to and from the property of plaintiff Kent.

We have held that hitching posts upon a street authorized by the proper authorities are not a nuisance *per se*. *Lacy v. City of Oskaloosa*, 143 Iowa 704; *Smith v. Jefferson*, 161 Iowa 245.

It does not follow, however, that they may not be a nuisance in fact under the facts of a given case. If a nuisance in fact, no authority is conferred upon the city to maintain them as such.

Whether the maintenance of these hitching posts upon this street under the circumstances herein indicated amounts to a nuisance, and whether such nuisance injuriously affects the plaintiffs as distinguished from the public generally, are questions of fact. The trial court found in the affirmative upon both propositions. By agreement of the parties, the trial judge looked over the ground, which was obviously a considerable aid in the application of the evidence. The defendants put in evidence a photograph of the street and this is before us. This indicates a rather dilapidated street and lends some support to the contention of appellants' counsel, viz: "That the hitching racks if placed there will be an ornament and lend enchantment to the situation." The photograph, however, was doubtless taken without notice and was perhaps a surprise attack upon the locality. It shows some broken vehicles which the plaintiffs claim do not normally belong there. Be that as it may, we see no escape from the conclusion that this rack of hitching posts does interfere with the ingress and egress of the parties to and from their property, and espe-

cially so as to plaintiff Kent. We are disposed to place considerable reliance upon the findings of the trial judge, and especially so in view of his better advantage in the observation of the street and its surroundings. The decree entered below must therefore be—*Affirmed*.

DEEMER, C. J., SALINGER and PRESTON, JJ., concur.

In re Estate of LOLY E. SCHOLES.

APPEAL AND ERROR: General Denial of Appellants' Abstract—

- 1 **Futility of Presumption as to Record.** Appellee's general denial of appellants' abstract availeth nothing in the way of overthrowing the presumption that sufficient of the record is before the court to enable the court to pass on the questions presented. (Sec. 4118, Code 1897.)

PRINCIPLE APPLIED: Appellee denied that appellants' abstract, plus appellee's amendment, contained all the material evidence upon which to determine the case. Appellee also made a showing, by affidavit, that other evidence had been taken, but the nature thereof was not indicated. *Held*, the general denial availed nothing and was not in any degree helped by the affidavit, and the above presumption would be indulged in.

- EXECUTORS AND ADMINISTRATORS: Claims—Fraudulent Allowance—Vacation of.**
- 2 The allowance, even on formal hearing before the court, of claims against the estate of the dead, is subject to special and distinctive scrutiny for fraud and collusion.

PRINCIPLE APPLIED: The deceased died July 2d. On September 2d following, a daughter was appointed executrix. On the day of her appointment, she asked the court to appoint a special administrator to pass on a claim which she asserted she had against the estate. Two days later, she filed a claim against the estate for \$2,902.00 for alleged services in caring for her aged mother during the twelve years preceding her death. Two days after the filing of the claim, the clerk of the court was appointed special administrator. He was not an attorney and made at best but a perfunctory investigation of the claim. On the day of his appointment, he reported to the court that he believed the claim to be well founded but did not wish to allow the same without the

approval of the court. Later, again, on the same day, the claimant appeared before the court by her attorneys, along with the special administrator *pro se*, a jury was waived and the matter was formally tried and the claim allowed in full. All the other sons and daughters of deceased lived outside of the state, and at the time knew nothing of the appointment, the filing of the claim, or its allowance. On timely application to set aside the allowance, it appeared that the claim was largely erroneous, unjust and materially and intentionally false. *Held*, the allowance should be set aside for fraud, notwithstanding the formal hearing.

Appeal from Adair District Court.—HON. W. H. FAHEY,
Judge.

FRIDAY, APRIL 9, 1915.

APPLICATION to set aside an order for the allowance of a claim in probate was denied and the applicants appeal.—*Reversed.*

H. J. Chapman, for appellants.

Musmaker & Williamson and *Frank B. Wilson*, for appellee.

LADD, J.—George Scholes died testate at Henry, Ill., in 1895, leaving a widow, Loly E. Scholes, and four children, Walter and William Scholes, Elizabeth Wilmot and Fausta C. Faris. The estate left consisted of a 160-acre farm and nearly \$9,000 in notes, moneys and other personal property and was taken in possession by the widow under the will. A mortgage on the farm and other debts were satisfied out of this. She died testate July 2, 1913, bequeathing a note of \$600 to Mrs. Faris and a note of \$650 to Walter Scholes, and directing that the residue pass to the children and a grandson share and share alike, as provided in the will of her deceased husband. Mrs. Faris was nominated executrix and September 2, 1913, she was appointed such by the court and duly qualified. On the same day, she filed her petition praying for the appointment of a temporary administrator “to pass on the claim of the

executrix in said estate." The claim was filed two days later, in words following:

"For care and custody of Loly E. Scholes, at her special instance and request from June 1st, 1901 to January 1st, 1911, a period of 498 weeks which services were of the reasonable value of \$4.00 per week, and from January 1st, 1911 to July 1st, 1913, a period of 130 weeks which services were of the reasonable value of \$7.00 per week making the total sum due the sum of \$2,902.00."

The clerk of court was appointed special administrator September 6, 1913, and on the same day filed his report:

"That I have made an investigation of the merits of the claim filed by Fausta C. Faris, in the amount of \$2,902; and believe that the said claim is well founded, but do not wish to allow the same without the approval of the Court.

"I therefore respectfully request the Court to pass on said claim."

On the same day, according to the record, the claimant appeared by attorneys and the special administrator *pro se*, a jury was waived and evidence introduced, and three days later, an order was entered establishing the claim in the full amount of \$2,902 against the estate. On November 11th of the same year, the other three children filed an application that the allowance be set aside, reciting the foregoing facts and alleging want of notice on their part, that the claim was excessive and for time when deceased was living with others of the children; that she had an income of about \$1,000 annually and paid her own expenses and required no care except during the last six months of her life; that the temporary administrator never investigated or passed on the claim, and for this reason, the order of allowance should be set aside, and for that it is a fraud on these applicants and on the court. The application was supported by affidavits and resisted in

the same manner. It appears therefrom that the decedent was eighty-seven years of age at the time of her death, that from the time of her husband's death, in 1895, she enjoyed an income of about \$1,000 a year, that Mrs. Faris first lived with her mother in Illinois and later the mother came to her home in Greenfield, in 1899, that thereafter she passed considerable of the time with Mrs. Wilmot in Colorado, visited her son William in South Dakota twice for several weeks each time, stayed with her son Walter and a grandson in Chicago over four weeks, with Walter in Des Moines two weeks, visited relatives in Illinois five weeks, and a sister in Kansas nearly three months, was in California six months from November 1, 1904, and that she paid the household expenses of Mrs. Faris when staying with her and when they traveled together. Even the showing of Mrs. Faris indicates that the account allowed was incorrect, and she does not deny the claim that her mother, when with her, paid the household expenses.

The showing is conclusive that the allowance was greatly in excess of any just claim Mrs. Faris may have had against the estate and should be set aside, unless the record is such as to preclude so doing.

I. Appellee denies that the abstract with her amendment thereto contains all the material evidence upon which to determine the case and, after setting out different items of evidence said to have been adduced, sets out two

1. **APPEAL AND ERROR:** general denial of appellants' abstract: futility of: presumption as to record.

affidavits, one by the party appointed temporary administrator, saying that he was duly sworn at the hearing hereof and testified that five witnesses were examined on the trial

wherein the claim was allowed and to other matters and identified exhibits, and the other saying that he also testified. The testimony of these witnesses appears to have been taken down in shorthand, but there is nothing in the record indicating that what they may have said had any material bearing on the issues being tried. The affidavits in no way aided the general denial mentioned, and we must assume that enough of the

record is before the court to enable us to pass on the questions presented. See *Howerton v. Augustine*, 145 Iowa 246; *Palmer v. Clark*, 114 Iowa 558; *State v. Poder*, 154 Iowa 686.

II. Where a claim is allowed by the court without hearing upon the approval or recommendation of an administrator or executor, the order may be set aside on motion sup-

2. EXECUTORS
AND ADMINIS-
TRATORS:
claims: fraud-
ulent allow-
ance: vacation
of.

ported by a showing that the amount allowed is erroneous, unjust and inequitable. *Rabbett v. Connolly*, 153 Iowa 607, 614, and cases cited. The allowance is in effect merely an

order on administrator to pay the claimant

from the funds of an estate, and is more in the nature of an adjustment than an adjudication. The investigation leading up to this is not so much for the purpose of compelling satisfaction as to ascertain the truth and justice of the particular claim. *Voorhies v. Eubank*, 6 Iowa 274. And the action of the court in entering an order allowing a claim approved or recommended by the administrator is not based on an inquiry into and findings of facts on issues presented by the court, but on the conclusion reached by the officer. Where, however, the claim is not approved by the administrator, and issues joined thereon are submitted to and determined by the court, a different rule applies. The adjudication is then as definite and binding on the parties as though a judgment entered in an ordinary action. This was determined in *McLeary v. Doran*, 79 Iowa 210, cited with approval in *Ryan v. Hutchinson*, 161 Iowa 575. "If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same or may submit it to a jury, and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply."

A trial of issues, under these circumstances, should be and is regarded as conclusive unless a just conclusion has been obviated by fraud or collusion. In ascertaining whether fraud has been practiced, however, the situation of the parties is an important matter to take into consideration. The party

whose estate is sought to be charged cannot furnish the information which only those to the transaction possess, and notwithstanding the limitations of the claimant's right to give testimony, the representative of the deceased often labors under peculiar disadvantages, and this is especially true where the administrator is claimant and one unfamiliar with the affairs of deceased is designated special administrator for the purpose of making defense. For this reason, courts will closely scrutinize all proceedings leading up to the allowance of claims of this kind and, in weighing proof of the fraud therein alleged, will take into account the relative situation of the parties, the nature of the proceedings and the result in view of the present showing concerning the facts. In the case at bar, a claim was presented which, according to the present showing, was in large part unfounded. It was presented by the administratrix, whose duty it was to protect the estate, not plunder it. The amount was sufficient to absorb a large part of the estate and was of a nature exacting a skilled defense. A person having no interest in the estate and not a lawyer was designated special administrator. He must necessarily have made but a perfunctory investigation and without counsel proceeded to trial at once. All the heirs other than the administratrix lived outside of the state and so far from the place of hearing that knowledge of the appointment of Mrs. Faris as administratrix could scarcely have reached them (she was appointed Sept. 2nd and the trial occurred on the 6th), to say nothing of learning of the filing of the claim. Nor was it expected that they should know. She had applied for the designation of a special administrator the very day of her appointment and two days prior to the filing of her claim. The claim showed on its face that the items were of a kind likely to be contested, and there is no other rational explanation of the transaction than that the design of the administratrix was to cut off all defense by taking snap judgment for an amount she well knew was erroneous and unjust. In other words, she undertook to perpetrate a fraud on the heirs by robbing the estate, and this

before they had an opportunity to defend through the special administrator, and this she accomplished by procuring the appointment of a person as such incompetent to defend and who joined her in submitting the claim to the court without adequate investigation and at a time those interested in the estate knew not of the claim and might not defend. She thereby perpetrated a fraud on the court and, had collusion been charged, we should have had little trouble in finding that the special administrator played into her hands and joined in her enterprise. If not, what was his purpose in proceeding without investigation and without consulting those directly interested? Something is said about one of the heirs obtaining possession of notes of the estate by a trick. If so, this did not justify the claimant in perpetrating a fraud on the court by procuring the allowance of an unjust claim. This case is to be distinguished from *Hendron v. Kinner*, 110 Iowa 544, in which no defense was shown and no undue haste exhibited. We are of the opinion that the order should have been set aside and the heirs accorded a hearing on the claim.—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, J. J., concur.

CHARLES A. SCOTT, Plaintiff, v. O. D. WHEELER, Judge,
Defendant.

DIVORCE: Custody of Children—Suspending Order Pending Appeal.

- 1 An order in divorce proceedings as to the custody of children may, on the same day when made, be suspended, pending an appeal from such order. The counter rule in habeas corpus proceedings has no application in divorce proceedings.

Certiorari from Pottawattamie District Court.—HON. O. D. WHEELER, Judge.

FRIDAY, APRIL 9, 1915.

THIS is a certiorari proceeding brought to test the legality of an order of the court of Pottawattamie County in a cer-

tain divorce proceeding pending in such court and is in the nature of an appeal from such order.—*Affirmed.*

Tinley, Mitchell & Pryor, for plaintiff.

Kimball & Peterson, for defendants.

EVANS, J.—On September 30, 1913, a decree of divorce was entered in favor of the plaintiff in the case of Maggie Scott v. Charles A. Scott. The decree awarded the plaintiff the custody of the minor child, Melvin. On October 22nd following, the defendant filed a motion to modify the decree by striking therefrom the provision as to the custody of the child. Notice of this application was served on plaintiff's attorneys. On November 29th, the plaintiff's attorneys consented that the provision might be eliminated. On February 5, 1914, the plaintiff, Maggie L. Scott, filed her motion in said case, asking that she be awarded the care and custody of the child. Resistance was filed by the defendant, Charles A. Scott. On this motion and resistance, a hearing was had on June 25th, resulting in an order awarding the custody to the defendant, Charles A. Scott. On the same day, application was made that the order be superseded, pending appeal to this court. This application was granted, a bond being required of the plaintiff that she would keep the child within the jurisdiction of the court and perform the final judgment of the district court and this court. The plaintiff in such case is a resident of Pottawattamie County, and the defendant, a resident of Missouri. The motion for the modification of the decree was heard by Judge Arthur and the order was made by him. The application to supersede was made on the same day, but after the departure of the trial judge from the city. Thereupon Judge Wheeler, of the same court, took cognizance of the matter by agreement of all parties. We think, therefore, that the question should be considered here in the same light as though Judge Wheeler

1. DIVORCE:
custody of
children: sus-
pending order
pending
appeal.

had been the trial judge who entered the order thus superseded. The argument for the appellant is that the proceeding was analogous to a *habeas corpus* proceeding and that the order entered therein could not, therefore, be superseded. The argument has its plausibility. We think, however, that it would not do to apply to a divorce action the rules that obtain in a *habeas corpus* proceeding. The question of the custody of minor children is necessarily incident to the determination of a divorce action. In such case, the court exercises a somewhat broader jurisdiction than in a *habeas corpus* proceeding, which theoretically involves only the legality of the present detention. The *habeas corpus* proceeding is a summary proceeding. Under the statute, a plaintiff therein is entitled to an immediate discharge "if no sufficient legal cause of detention is shown." Code Sec. 4452. In such case, we have held that to permit such an order to be superseded would defeat the summary character of the remedy. *State v. Kirkpatrick*, 54 Iowa 373.

We have also held that, where a discharge was refused in a *habeas corpus* proceeding on the ground that legal detention was shown, there could be no occasion for a supersedeas to maintain the *status quo*. In such case, the supersedeas order is not available to the plaintiff to give him a temporary discharge from the custody to which the order of the court remanded him, because this would interfere with rather than maintain the *status quo*. *Orr v. Jackson*, 149 Iowa 641.

The right to sue out a writ of *habeas corpus* is a continuing right and is never foreclosed by a previous adjudication. Though it be denied today it may be granted tomorrow. The rules of procedure, therefore, in such a proceeding are peculiar to itself and are not controlling in other forms of action. Turning, therefore, to the divorce proceeding, the plaintiff Maggie was in the actual control and custody of her child. The question before the court was: Which was the more suitable party to exercise such control and custody in the light of the best interest of the child? That the order

of the district court was necessarily appealable is not disputed. That the interests of the child might require that its custody be not disturbed until the final determination of the controversy is quite evident. We think it manifest that the court could properly have taken this view when it made the order awarding the custody to the father and that it could properly have made provision for delay in the execution of the order until the appeal, if any, could be heard in this court. The application for the modification or stay was made immediately and upon the same day. The jurisdiction of the court was not lost. We think, therefore, that the court had power to make the order. The merit of the order in any other respect is not before us. The writ of certiorari will therefore be discharged.—*Affirmed.*

DEEMER, C. J., LADD and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. FRANK VALVODA, Appellant.

SEDUCTION: Unchastity—What Constitutes. Previous chastity of
1 the female is an all-essential element of seduction. Without it
there can be no seduction. To be chaste, such female must be pure
in mind and innocent of heart. The crime cannot be committed
with a female who barter for an offer of marriage *in futuro*
sexual favors *in praesenti*, and whose letters and conduct stamp
her as impure and lustful in mind and heart.

Appeal from Howard District Court.—HON. W. J. SPRINGER,
Judge.

FRIDAY, APRIL 9, 1915.

THE accused appeals from a conviction for seduction.—
Reversed.

Reed & Pergler, for appellant.

George Cosson, Attorney General, *Wiley S. Rankin*, Special Counsel, and *Joseph Griffin*, County Attorney, for the State.

LADD, J.—The law seems more tender of the female than of the male, for no statute condemns a woman for having seduced a man from the paths of virtue. Probably this is

1. SEDUCTION:
unchastity:
what constitutes.
- because of legislative recognition that ordinarily the male is likely to be the aggressor.

It is a matter of common knowledge, however, that this is not so always, and many a youth has been led astray by the blandishments of fair women. More frequently, both are equally at fault, and then neither should be blamed or punished in order to shield the other. The prosecutrix had known defendant several years, had danced with him in November, 1911, and he took her out riding on Christmas, when, according to her testimony, he put his arms about and kissed her, told her he loved her and wanted to have sexual intercourse with her and that, if he could, he would marry her, but that she did not want to. He next met her at a dance at Protivin from which she started home, a distance of five and one-half miles, with her brother and two others, at three o'clock in the morning of June 6, 1912. The defendant had taken a young lady to her home and on his return drove up from behind them, about a mile and a half out of Protivin, and inquired if they were crowded. Upon being informed in the affirmative, he asked her or one of them to ride with him, and she got out into his buggy when, quoting from her testimony, "he then put his arms around me and kissed me and said he loved me and wanted to have sexual intercourse with me. I didn't want to. He asked me if I remembered what he told me the first time in December, and I said 'Yes.' He said, 'Well, then,' and I asked him if he meant every word he said, and he said he did. He had sexual intercourse with me."

According to her story, the act was repeated before her home was reached, and without stopping the buggy, as the team and buggy of her brother followed them. More remarkable yet is it that this was done with the lines in his hands. Surely this could scarcely have been accomplished without

some aggressive assistance, and that this might have been rendered appears from their previous correspondence. Moreover, such correspondence reveals an utter absence of any sentiment of affection on the part of either, and that the thoughts of each concerning the other, as the correspondence proceeded, were more akin to passion than anything else. The postal of March 24, 1911, read:

"Cresco, Iowa, Hello Kidoo:—Must now ans your pretty card which I recd some time ago. How are you am fine and dandy hope to find you the same. That card was just dandy couldnt be better Ha ha. Must tell you that we kids are alone our folks went to S. Dak. you better come down soon. Excuse handwriting Bye Bye Kido Ans soon to the same Kid."

On the reverse side of the card is printed: "Sweetheart, will you stroll by my side."

He responded: "Cresco, Iowa, March 28-11, Hellow there:—Must now answer your welcome postal which I rec'd last week and many thanks for same. So you Kids are just by your-selves I understand well if you would be closer I might run down for a while how do you like this fine weather its grand in the house alright alright When will we go out for a evening ride Kid? will drop in some Sun eve when its fine and warm will that be alright Remain as ever yours friend. S. W. A. K. or 2."

Again on the same line she wrote among other things:

"Oh Kid when are you coming down anyway now be sure to come Sun eve I will be waiting for you sure come early and stay late dont for get and why dont you ans my card get busy and ans soon. I presume you are getting ready for the dance the 17th I wish I could go. Now be sure and come Sun eve. will be waiting for you sure Kidoo. Remain as every Your friend E. H. Bye Bye S. H. Ans soon."

He wrote: "Cresco, Iowa, April 1911 Hello Emma:— Must tonight answer your most welcome postal. Well how are you today? I bet you think I am a hot one for not coming down Sunday eve dont you Kid? was under weather little so I almost had to be in bed but never mind we shall make up lost time after I got done seeding, then I must have every thing coming my way Ha Ha if not I will stay at Home sweet Home any-one might as well wont you think so? There is a Kiss under this stamp for you only."

Another card written by her May 28th following had a picture of a girl sitting on a fence under a tree with the arm of a young man about her tickling her chin and knee under her. On November 8, 1911, he wrote in kind:

"Cresco, Iowa, Hello Emma:—How is you by this time? havent seen you for a year or two I drove in the other day but stung Ema was in the woods spooning ha ha. I will not say much as I am very busy spooning ha ha."

She wrote again December 13, 1911: "Hello Kiddo How are you anyway am fine same as usual and hope to find you the same. Reed Roses and your card some time ago and was glad to hear from yous and there certainly was enough to read didnt know what to read first Ha Ha What are you doing now-a-days setting in the house I presume or may be you are over to Ond most of the time Ha Ha You and Rosey go to work and send me another card like that so I would have some thing to read maybe. I will see you this week then will ring off for today. Bye Bye ans."

On the other side of the card is the picture of a woman scantily attired in a combination suit of underwear, stockings and slippers, exposing legs from knees, lying on a couch, and over the picture printed, "Well, Kiddo?"

He responded to this December 18, 1911: "St. Paul Minneapolis, Dec. 18-1865, Dear Friend, Must and will ans your

very very noble looking card so you got that card all O. K. but will say this beats it all to heaven How is your body these cold nights any-way Ema? wish I was there to warm you up a little hope to meet you face to face very soon as you look good to me, am out of news so I will end off with six doz of Kisses to you if that to much send some back by return mail."

Instead of resenting this, she followed up the advantage gained by writing:

"Dear Friend:—Must today answer your kind and welcome card which I reed some time ago. How are you am fine and dandy and hope to find you the same O yes you better come and warm me Ha Ha I need some one. I presume you are going to the dance Jan 6th I suppose they are going to dance in the new hall wish I could go. When are you coming down. Hope to hear from you again very soon. This is the same Kid as before Bye Bye S.W.A.S.K. to you only."

Again she wrote: "Oh Kid come down Sun. eve. Will be home alone with the kid, the folks are going away. Then it will be something doing." Evidently he yielded and took her out riding Christmas. And in his letter on the following day, he refers to what then happened.

"Howdy Kid:—One more I sit me down and take the proverbial pen in hand. How did you get over that funny night ha ha that was the limit allright will try to do better next I guess yes; I bet Ema thought Frank is hot Boy? but he is right at the point when he feels good, never mind old Kid time will come its on its way, all the time Rosie get busy and ans soon as possible or sooner yet With Best Kiss to Ema."

On the other side of the card is printed and written the following:

"This is my only Bad Habit and you know it, Here is the way we will and must spoon next Sunday eve and then

some ha ha rain or shine Dont you think so? hope to meet you very soon and in feelings you know what I mean May Health and happiness both be yours, and fortune smile on all you do; Bye Bye My Eva."

From Cresco she wrote saying she was having a fine time and wished he was there and inquired if he had not so wished. On the other side of the card was the picture of a boy sitting in a chair with his arm about a girl seated on its arm and her arm around his neck, with her lips against his. This struck a responsive chord, for he wrote:

"1-4-12 Hello Ema:—Must answer your fine card enjoyed reading very much, how is the city any way good I presume, wish you Kid was home I would show you a big night you know all about it yet. I spose you bet your sweet life I will see you as soon as you come home then we will make go some I mean the game you have send me. Be good gal what ever you may do. Bye Bye gal and dont delay your ans a kiss to you from Smith."

He again wrote on the 26th inquiring: "How did you get over the grand time you asked me when am I going to come down to see you I will be down soon now if my chances are as good as the time you was out with me so let me know soon you know I am all broke with Ozy once for ever so let me hear from you very soon and tell me what I want to know so try your best friend, I will be right on the spot. Please ans soon Kid."

In another from Cresco she inquired when he was coming down, said she hoped to see him soon and didn't know how she could "Stand it here ha ha come soon." On the back of the card was the picture of a young woman with dress dropping down from shoulders and up over knees, affording a glimpse of shapely legs, touching beer glasses with an interested young man.

After she returned from Cresco, she sent a card, on the

back of which was the picture of a boy and girl in thick foliage kissing, and underneath the words, "Honey suckles."

On February 16th she admonishes him: "Hello Kid, How are you am fine same as usual and hope to find you the same. What in the world was the matter with you Kids last Sun you was too much in a hurry I bet I know why Ha Ha You are slow of coming down here Kid Well I guess it wouldnt do you much good Ha Ha like the last time that was a fright that night wasnt it I should smile. Are you going Mon. S. W. A. K. Bye Bye Ans soon as possible Kid to your friend E. H."

On March 8th following, she chided him for not coming:

"Dear Friend You certainly was a dandy for not coming down Sun last was looking and waiting for you paisently Whats the matter with you didnt my last card suit you or what. You said you will be right here but you are slow of coming. When will you come. Kid why dont you ans my card? J. B. was looking for you also he was here and he said you are surely coming. Well some soon Bye Bye ans soon right way S. W. A. S. K. or 2."

On the back of the card was a picture of a young man and lady at a fountain, and underneath printed: "On the fountain of love."

Again she wrote on March 15th, acknowledging his card, inviting him down Saturday evening or Sunday, and saying that she was sewing: "Come and help me, then we would do a fine work ha! ha!" On the card was a picture of a young man and woman in each other's arms, kissing, and above them the words: "Alone at last." In writing at the side: "S. W. A. K. to you," which according to her interpretation, means "Sent with a kiss."

A card postmarked April 12th from him reads: "Hello Mutt:—Your card reached me the other day. What in the

hell are you drivin at now days? Am going to Protivin Sunday eve. you better shine along we will try to do something—you know what it is if you care to go just say yes and if not say know there is others."

He wrote her again, April 5th: "Austin, Minn. April 4, 1936, Hello there:—I must or had better drop you a card just for the fun, how is Ema feeling this time of the year. hope you are the way you was once upon a time. You know what I mean by saying so Ha! Ha! Are you going to Pro Sunday? I want to see you there about some thing, so try to be there. Send to you with all good wishes when we get together Kid we will be going some."

And on April 22nd, he wrote in kind: "Hello you fast gal:—I must drop you a line or two just to see how is my friend feeling at present. so you have changed your mind that what I thought you would do well by the way there is nothing like it ha ha. I had a notion of going down Sunday eve but it was so damn dark but they all say darker the better but fudges light hurt me any how about you kid? I will try to see you Sunday eve sure but Remember Frank Kid you know say drop me a letter if you feel that way if not do so any how. Here hoping to hear from you soon Will close with all the kisses I can impress on your lips. From Minnehaha 5467 Ave. Minn."

It will be noted that not a word indicative of affection passed between them, and her claim that he told her on Christmas Eve that he loved her is utterly without corroboration. Their communications both prior and subsequent to that time breathe more of lust than love, and even though she may not actually have indulged her passions with him, they plainly stamp her as a female of such impurity of mind as to constitute her unchaste within the meaning of the law; for, as the court rightly instructed the jury, the impure in mind and conduct are unchaste even though never having had carnal

knowledge of man. The statute denouncing a penalty for seduction is for the protection of the pure in mind and innocent of heart, and may not be perverted to the punishment of persons induced to indulge in fornication by manifestations of desire and cravings for the satisfaction of passions on the part of the female, which preclude any inference either of existing chastity or that promises or seductive arts were necessary in order to overcome any scruples against the gratification of the animal propensities. The defendant responded in kind and merely kept pace with the prosecutrix.

If the language of the defendant were the stronger, she made up for any deficiency by the character of pictures on the back of the cards. The correspondence was continued after June 6th, the day of the alleged seduction, but contains not a single allusion to an engagement to marry nor a sentiment of affection. It does contain suggestions of meretricious relations, however, and it may be that undue intimacy existed between them. Any evidence subsequent to the time of the alleged seduction can only be considered as bearing on conditions at that time, and the previous relations of the parties were not such as to corroborate her testimony save as this may appear in the cards quoted. She only claims a promise of marriage on condition that she would have intercourse with him, and the correspondence tends strongly to show that this must have been a matter of barter, an offer of wedlock *in futuro* for the sexual favors *in praesenti*. See *State v. Price*, 157 Iowa 412.

If he expressed love for her, as she testified, the existence thereof did not otherwise appear, and what he may have said was accompanied with a proposition to do what both had been contemplating, not to say doing, for many months previous. He denied ever having expressed sentiments of affection for her, and the correspondence harmonizes with his testimony. No one can doubt to what the postals allude and on what her mind as well as his was bent. Her relations to defendant were such as to encourage lust and stimulate passion. The

statute denouncing seduction is not intended for the protection of females of this character, but to shield the chaste in mind as well as in conduct. Because of the conclusive showing of previous unchastity; the defendant should have been acquitted.—*Reversed.*

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

EMMA B. WILSON, Plaintiff, v. MARY JANE KEATING CALHOUN et al., Appellants.

CANCELLATION OF INSTRUMENTS: Fraud—Duress—Undue Influence—Advice of Friends—Threat of Prosecution—Blackmailer.

No free mental agency, no deed. A deed may be set aside as for undue influence, fraud and duress when executed by the grantor under the influence and by reason of the urgent advice and solicitation of the grantor's *friends* and *confidants* that he execute the deed and flee the country in order to avoid a prosecution for a crime of which grantor was confessedly guilty, threatened by a blackmailer who, having learned that grantor had committed the crime, was using such knowledge as a leverage to extort money from grantor on a bogus claim. And this is true though the grantor's friends took no advantage by the deed, and though the grantees took no part in the fraud, duress or undue influence.

PRINCIPLE APPLIED: One K forged a note. Later, this was financially adjusted. One L learned of the forgery and fabricated a claim against K and conveyed to K's friends his intention to prosecute K on the forgery charge unless his claim was paid. K's friends and confidants, including his own attorney, found K, placed the matter before him, enlarged on the grave danger he was in, advised and urged him to execute a trust deed to his two minor children and flee from the country. K, much agitated and frightened, was kept concealed until late at night, when he was taken to the attorney's office, the deed was executed, a ticket was purchased for him to a point in a distant state, hats were exchanged, the parties made their way secretly to the train, which the grantor boarded from an alley, and K remained in hiding for some seven months thereafter. *Held*, the deed should be set aside.

CANCELLATION OF INSTRUMENTS: Deed—Fraud—Delay in Action to Set Aside—Laches. One must, of course, move with

promptness to set aside his deed on the ground of fraud, but a delay of some eight months in instant case did not render plaintiff guilty of laches.

PRINCIPLE APPLIED: (See under No. 1.)

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

FRIDAY, APRIL 9, 1915.

ACTION for the partition of certain real estate owned by Hugh J. Keating, now deceased, at the time of his death. Plaintiff is a daughter of the deceased, and defendants are his administrators and heirs at law, and the holders of a lien upon part of the lands. Plaintiff and defendants Mrs. Calhoun and John H. Keating each claimed an undivided $9/147$ interest in the land; and alleged that Winnie Mitchell, Mrs. Cowart, and Mrs. Cook were each the owners of $23/147$ of the land; and asked that the other defendants be required to establish their respective interests in the property. Plaintiff and Mrs. Calhoun each asked the reformation of a quitclaim deed which they executed on September 30, 1909, to Hugh J. Keating, a brother, conveying a certain interest in the land.

There is no dispute as to the interests of Mrs. Mitchell, Mrs. Cowart, and Mrs. Cook in and to the lands in controversy. Hugh J. Keating, a son of the deceased, by cross-petition claimed to be the owner of an undivided $51/147$, subject to a mortgage given by him to a certain bank, which is made a party defendant. He also claimed that a certain deed made by him to one Pitner, trustee, who is also made a defendant, for the ostensible benefit of Hugh Hubert Keating and Lloyd J. Keating, minor children of Hugh J. Keating, who are also made defendants, was executed on Sunday, and was obtained from him by duress, fraud, and false representations, and undue influence; was without consideration and void; and he asked that the same be set aside and can-

celled. Pitner, the trustee, and one Voris, the guardian for the minor defendants, claimed the share which their father inherited from the deceased under the deed just mentioned, and denied the allegations of fraud, duress, undue influence, etc.

The trial court found that the deed of Hugh J. Keating Jr. to the trustee was obtained through duress and undue influence; and entered a decree cancelling and setting the same aside; and established the interests of the several parties accordingly; and the guardian, Hugh J. Keating, Emma B. Wilson, and Mrs. Calhoun appeal.—*Affirmed*.

Voris and Haas, for appellant.

F. L. Anderson and C. W. Kepler & Son, for appellees, and for Mrs. Wilson, Mrs. Calhoun and Hugh J. Keating.

DEEMER, C. J.—Under the pleadings, there is no real issue in the case save upon the deed made by Hugh J. Keating to Pitner, trustee; and this is attacked upon the grounds stated. The trial court found that the deed was obtained through duress, ordered it cancelled and set aside, and allowed an attorney's fee of \$200.00 in favor of the attorneys for the guardian, Voris, to be paid out of the share awarded to Hugh J. Keating.

1. CANCELLATION OF INSTRUMENTS: fraud: duress: undue influence: advice of friends: threat of prosecution: blackmailer.

The appeal is from the ruling setting aside and cancelling the deed, and the sole question presented is the validity of that deed. It should also be stated that the trial court refused to reform the quitclaim deeds made by plaintiff and Mrs. Calhoun to Hugh J. Keating, and that these last named parties appealed from this part of the decree; but it is agreed that, if the decree setting aside the trust deed be affirmed, there is no need for considering these last mentioned appeals.

The elder Keating left a wife, two sons, and five daughters surviving. He died in the year 1903; and the son Hugh J. Keating Jr. continued to live upon the land until the death

of the widow, his mother, in the year 1912. In March of the year 1909, Mrs. Calhoun sold to her brother, Hugh J. Keating, an undivided one-seventh of a two-thirds interest in the lands left by the elder Keating, and executed a quitclaim deed to him purporting to convey all her interest in the lands; and in September of the same year, Mrs. Wilson, a daughter, also conveyed to Hugh J. Keating, by the same kind of a deed, her undivided one-seventh of a two-thirds interest and executed a quitclaim deed which purported to convey all her interest in the lands. It is agreed between the respective parties to these deeds that they were intended to convey but an undivided one-seventh of a two-thirds interest in the lands left by their father, and not any interest which they derived from their mother after her death.

After Hugh J. Keating obtained these deeds, he married, and brought his wife to live upon the land involved in this controversy, with the widow, who was then alive, and living upon the premises. Although matters did not run smoothly, these living arrangements continued until the death of the widow in April of the year 1912. Almost immediately upon her death, Hugh's wife commenced an action for divorce against him. Hugh consulted attorneys, and it was agreed that he should pay his wife \$3,000 alimony. He claims he was advised that he must have the money at the time the divorce decree was rendered. However this may be, it appears without question that he almost immediately forged the name of an old friend and neighbor, one Lyman, to a note for \$3,100, negotiated it with a bank in Linn County, obtained a draft for the amount thereof, which he delivered to his attorney the day before the divorce case was heard and the decree granted.

This decree was granted on Thursday of a certain week, and on that day the \$3,000 was paid to the attorneys for the wife. On the next day after negotiating the note, the forgery having been discovered, Keating sent word by his brother-in-law to Lyman to meet him; and on Saturday following the

Thursday on which the divorce was granted, Keating, Lyman, and the cashier of the bank who purchased the note went to Cedar Rapids and there had a conference with some attorneys, resulting in a settlement of the matter.

By agreement, Keating made a deed to the bank to secure the amount of the Lyman note and all other debts which he, Keating, was owing the bank, and to further secure the sum of \$200 which he, Keating, was then owing his attorney in the divorce proceeding. It is also claimed that the bank at that time agreed to advance to Keating enough money to take care of all his other indebtedness, the deed to his interest in the land involved in this proceeding to stand as security for all of these amounts. Lyman and Keating then returned to their homes, Keating intending to go back to work for the man in whose employ he then was.

An information had been filed against Keating for the Lyman forgery, and this in some manner became known to a man named La Velle. La Velle claimed that Keating owed him something like \$500, and he went to Keating's attorneys and to the banker, Pitner, and told them he would have Keating sent to the penitentiary unless he, La Velle, was paid the \$500. Fearing this might be done, Pitner and Keating's attorneys, on the Sunday following the day on which the bank matter was settled, got into an automobile and went out to where Lyman lived and told him of the threats that were made; and Lyman then got into the machine with the other men, and all started in search of Keating, with the idea of advising him to leave the country. Before finding Keating, these men agreed that they would advise him to make a trust deed to the banker, Pitner. They finally found Keating and revealed the story to him, and one or all advised him to leave the country, the attorney telling him that he would have to remain away three years in order to escape an indictment which might be found against him; and he also advised him that La Velle could prosecute him for the forgery and

send him to the penitentiary. Lyman also advised Keating to leave the country.

There is also testimony to the effect that this attorney said to him that he had seen the county attorney, and that if he, Keating, would sign away his property in the manner suggested, he (the county attorney) would not prosecute Keating. After this conference, the parties all started back to Cedar Rapids, Keating stopping on the way to bid his sisters goodbye, saying to them that he was going to leave the country on the advice of his attorney and of his old friend, Lyman. The sisters advised him not to go, but he seemed in a very nervous and excited state of mind, and finally left them, saying, "Goodbye."

There was talk at this time about the execution of some kind of a trust deed to Pitner. When the party arrived at Cedar Rapids, Keating was taken to the home of one of his attorneys, where he remained until about ten o'clock, Sunday night, when he was taken to the attorney's office, and there the trust deed which is the subject of this controversy was prepared, and signed by Keating. He, Keating, says it was signed before midnight, but the other parties present said it was shortly after midnight, and that the signing was purposely delayed until after the stroke of twelve.

While at the attorney's house, Keating said he preferred to deed the property to his sister, Clara, but was advised this would not be legal, and he then said that if this were true, he would deed it to the banker, Pitner. Keating also suggested that he wished to go down in town; that he would like to see La Velle; but his attorney advised him strongly not to go; that "he, La Velle, would have him arrested the first thing."

After they got to the office, his attorney advised him not to write to anybody, not even his sisters; to write to him, the attorney, and he, the attorney, would keep his sisters advised. After the deed was signed, the banker and the lawyers took Keating to the depot by automobile, and at the suggestion of one of the attorneys, he and Keating exchanged hats, in

order to escape detection. One of the attorneys went into the depot and purchased a ticket for Keating, he, Keating, remaining in the automobile until the train arrived, and when it came, Keating took an alley to get to his car. The ticket was purchased for some point in Idaho, and thither Keating went, remaining there in hiding until the following January, when he was discovered by a brother-in-law and his fears allayed.

There can be no doubt, under this record, that Keating signed the deed because of fear of the penitentiary; that he was so frightened as to become a fugitive from justice; and that he was induced to execute the instrument through fear. This deed of trust made Pitner a trustee and directed the trustee to sell all the real estate conveyed, which covered all Keating's interest in the land in controversy—no matter how derived, whether from his father or mother, or by deeds from his sisters—and to pay the proceeds to the grantor's sons, Hugh Hubert Keating and Lloyd J. Keating, when they arrived at the ages of twenty-three and twenty-one years, respectively. If either died before reaching that age, his share was to be paid to the survivor; and if both should die before reaching the age stated, the proceeds should be paid to his sister, Clara Cook.

The trial court found that the deed was executed on a secular day; but was of opinion that it should be set aside because obtained by fraud, duress, and undue influence; and we are constrained to hold that it was right in both conclusions. Even if executed on Sunday, it is not subject to be set aside on that ground alone. *Dorough v. Equitable Mortgage Co.*, 118 Ga. 178; *Shuman v. Shuman*, 27 Pa. St. 90.

The transaction was fully executed, and neither party may rescind and recover the property or the purchase price because the deed was signed and delivered on Sunday. *Kelley v. Cosgrove*, 83 Iowa 229; *Kinney v. McDermot*, 55 Iowa 674.

II. Appellants contend that the trial court was in error

in setting aside the deed for duress, fraud or undue influence, and aver that, as the deed was made for the purpose of hindering, delaying, and defrauding La Velle, who was a creditor of Keating's, he cannot be heard to plead his own fraud and have his conveyance set aside. The claim of La Velle was a mere incident of the transaction. No one of the parties regarded it as valid, and no attention would have been paid it, save for La Velle's threat to prosecute Keating if he did not pay it. It was the threat of the criminal prosecution which induced Keating to act and to leave the country, and not the desire to defeat La Velle's bogus claim. True, there was some talk that La Velle might at some time bring a suit to set the conveyance aside; but the only influence this had was to determine who of several persons should be made the grantee or trustee in the deed. No attempt would have been made to transfer the property, had it not been for the threat of La Velle to prosecute Keating for his crime of forgery. It is not a case where a grantor of property is seeking to take advantage of his own fraud. Keating was expecting to leave the country for good, to escape the threatened criminal prosecution, and the deed was made because he was leaving his interests in real estate which should be looked after.

III. Appellants further say that there was no duress and no undue influence, because no threats were made by the grantees or anyone representing them. It is true that none of the parties who induced the making of the deeds themselves made any threats; and it is also true that they assumed to act as Keating's friends. Some of them were his attorneys; but these facts make the case stronger in some respects than if they had made the threats themselves. Naturally he was the more ready to yield to what they said regarding the threats made by La Velle, and more likely to be affected by them than if La Velle himself had made them in his presence.

Keating's own lawyers, his friend, Lyman, and the banker seemed to be as much or more concerned over them than was Keating himself; and because thereof, Keating was induced

to conceal himself, to leave the country, even against the advice of his sisters, and to make a deed which had never been suggested by anyone until these threats of criminal prosecution came to his ears. It is entirely immaterial that the parties who were with him derived no profit from the transaction. The primary question is the state of the grantor's mind. Was the deed his free and voluntary act, or was it obtained through duress, or undue influence? If the latter, it is not his deed, and it should be set aside although the duress or undue influence was not practiced by the grantees, and the parties making the threats received no benefit whatever from the transaction. Again it is suggested that the threats made by La Velle, communicated by the banker, the lawyer, and the friend to Keating were not of a kind to constitute duress or undue influence, for the reason that these threats were merely to prosecute for a crime of which Keating was in fact guilty. Some of the old cases seem to hold that a threat to prosecute one for an offense of which he is in fact guilty does not constitute duress; but, save in exceptional cases, as perhaps where one wronged by the commission of an offense is entitled to reparation for the wrong, and may compound the offense, the law now regards a mere threat to prosecute one for a crime of which he is in fact guilty as sufficient to constitute duress. See *Bank v. Loos*, 142 Iowa 1, 7, and cases cited. Here, the threat made by La Velle was an unlawful one under any aspect of the case, and when conveyed as it was to Keating by his friends and attorneys, with the suggestion of danger and advice to leave the country, it naturally disturbed his free agency and amounted to undue influence, if not duress. In this connection, it may be observed that duress and undue influence are much alike; the former has been said to be "the extreme of undue influence." *Commercial Nat'l Bank v. Wheelock*, 40 N. E. 636. In either case, however, a contract cannot be avoided unless it controls the free action of the party's will. Again, it is said that the threats must be of an unlawful arrest, and that, as the record

shows Keating was in fact guilty of the crime of forgery, there was no duress. Whatever the rule generally, it appears from the record now before us that La Velle's threat was unlawful, that it was made to induce the payment of a fictitious claim, and not to vindicate the majesty of the law; and under all the cases, such a threat is unlawful, and other things being established, will amount to duress. *Kennedy v. Roberts*, 105 Iowa 521; *Morse v. Woodworth*, 155 Mass. 233; *Fountain v. Bigham*, 235 Pa. St. 35, 29 Ann. Cases, 1185.

As already suggested, it is of no consequence that the parties guilty of the duress or undue influence received no benefit therefrom. A trust deed which is obtained by duress or undue influence is void although neither the trustee nor the beneficiaries participated therein. The reason for this is that the instrument is not the deed of the party making it and is avoidable at his election. *Ewing v. Bass*, 48 N. E. 241; *Smith v. Boyd*, 47 Atl. 816; *Bank v. Bryan*, 62 Iowa 42; *Bank v. Kusworm*, 26 L. R. A. 48, 91 Wis. 166.

Could it be said under the record that the threats of La Velle did not induce Keating to make the deed, it nevertheless appears that these threats, aided by the advice and suggestions of his friends, induced him to do an act which he would not otherwise have done, and unduly influenced him, so that the act of making the deed was not of his own free will, and for that reason it should be set aside.

2. CANCELLATION
OF INSTRUMENTS: deed:
fraud: delay
in action to
set aside:
laches.

Finally it is argued that Keating was guilty of laches, and that he is not entitled to have the deed set aside because he did not act with that promptitude which the law requires. Under the influence of the threats, Keating left Cedar Rapids surreptitiously and kept his whereabouts unknown until he was discovered by his brother-in-law and brought back to Iowa in January of the year 1913. The trust deed was executed on June 10, 1912, and Keating's cross-petition was filed January 29, 1913. There was no such delay as to defeat Keating's claim under his cross-petition. The record shows

that the influence of the threats upon Keating's mind continued until his brother-in-law went to Idaho and found him in January, and the action was commenced within a few weeks thereafter.

As we affirm the trial court's finding on the issue as to the validity of the Keating deed, there is nothing left to consider. The guardian who appeals in this case represents minor defendants; and but for the fact that he stands in this representative character, we would be disposed to criticize him for bringing the case to this court. The mere statement of the case is the best argument that can be made in support of the decree of the trial court. The facts recited make out a clear case of duress and undue influence, and no other conclusion could reasonably be reached.

Appellant's motion to dismiss Keating's cross-appeal is sustained. The decree is correct and it is—*Affirmed*.

LADD, GAYNOR and SALINGER, JJ., concur.

D. L. PASCAL et al., Appellants, v. AGNES HYNES, Appellee.

WATERS AND WATERCOURSES: Agreed System of Drainage—

- 1 **Statute of Limitation—Easement.** A drainage system between the lands of different owners, constructed in the natural course of drainage by one of the landowners with the consent and acquiescence of the other, and continued and maintained for more than ten years to the mutual advantage of both of said owners, becomes a finality, an irrevocable easement which nothing will obliterate except an actual abandonment, as distinguished from an intention to abandon.

WATERS AND WATERCOURSES: Easement in Drainage System—

- 2 **Abandonment—Facts Not Constituting.** Evidence reviewed and held insufficient to show an abandonment of an easement in a drainage system.

WATERS AND WATERCOURSES: Easement in Drainage System—

- 3 **When Revocable—Failure to Repair.** An easement in a drainage system granted on a valuable consideration is not revocable at pleasure, even for a failure to repair as per agreement. The

remedy for the complainant is to repair and demand recompense from the one holding the easement.

WATERS AND WATERCOURSES: *Drains—Increased Flowage on 4 Servient Estate.* Drainage which brings no material increase in flowage to the servient estate furnishes no ground for complaint.

Appeal from Clinton District Court.—HON. A. P. BARKER, Judge.

SATURDAY, APRIL 10, 1915.

THE facts appear in the opinion. Both parties appeal. *Affirmed* on plaintiffs' appeal. *Reversed* on defendant's appeal.

Ellis & McCoy and *Pascal, Pascal & Pascal*, for appellants.

Wolfe & Wolfe, for appellee.

LADD, J.—Plaintiffs own the $W\frac{1}{2}$ $NW\frac{1}{4}$ of Section 9 and the defendant, the $E\frac{1}{2}$ of said quarter and the $E\frac{1}{2}$ $SW\frac{1}{4}$ of Section 4, immediately above it. Between the sections is a highway which has been graded so as to be about $3\frac{1}{2}$ feet above the natural surface. Near the southwest corner of the 80 in Section 4 was a pond of about two acres. Across the road to the southeast was a smaller pond. A swale extended from near these ponds in a southwesterly direction into the land of plaintiffs and then southerly for a distance of about 80 rods, emptying into a larger pond of about 3 acres, mostly in the plaintiff's land, but somewhat over the line on that of defendant.

The evidence leaves no doubt that there was a natural watercourse extending from a point in plaintiff's land about 50 feet south of the highway south to the pond last mentioned, with a fall of nearly 25 feet, and we are satisfied such watercourse originally extended across the northwest corner of defendant's south 80 into the highway and drained

the surface water settling in the pond in her north 80. But this cannot be ascertained definitely from the record before us, though apparently believed by the engineer. For many years prior to the trial, the road had been graded and the water from the north pond carried through a culvert therein and along a ditch on the south side of the highway about 80 feet west, and from that point the water passed southwest into plaintiff's land down the swale. The small pond immediately south of the highway was drained into this ditch on the south side of the road. In 1895, Martin Hynes (defendant's father-in-law, through whom she acquired the land), with the consent of George Pascal (plaintiffs' father, from whom they derived title), excavated a ditch from the culvert along the road across his south 80 into plaintiffs' land, about 10 rods, and laid tile therein. The water from this tile caused a mud-hole, and in 1904, defendant's husband, then owner of the land (she subsequently took under him), in pursuance of an agreement with plaintiffs, through D. L. Pascal, extended the tile drain to the pond on the line about 80 rods south of the highway, and the following year, additional tile was laid so as to cast part of the water into the pond on defendant's side of the line. As said, the tiling last done was in pursuance of an agreement entered into by plaintiff D. L. Pascal and one Jensen, representing defendant's husband. Pascal testified that it was agreed "that if I would not stop up the tile and let it go until after they got the crop in, and would allow them, until after they got the crop of corn in, allow them to carry this water down the natural watercourse to this pond they would build a fence around it whenever I got ready to tile to the pond, and he would go ahead with it and see that one-half the expense was borne by Mr. Hynes. . . . that he should keep this ditch in repair and maintained. That is all the tile drain mentioned as having been laid." Donahue testified that "after we put the tiling in I know Hynes wanted Mr. Pascal to give him some record about the tile. He asked Mr. Pascal if he was satisfied, and Mr.

Pascal said yes he was perfectly satisfied. And he wanted him to give him some writing about it. Mr. Pascal said he would not because he said if there became any holes in the tiling he expected Mr. Hynes to fix them, and Mr. Hynes said that would be all right." The tiling drained out the ponds near the highway, but plaintiffs claim that defendant did not keep it in repair, D. L. Pascal testifying that: "The dirt was washed off in one place in particular and there were other places where there were holes where the dirt was gone and it made holes in the tile. When a heavy rain came the water would come out, boil up out of those places, and there was danger of the stock stepping in those places and getting hurt; horses were in there. Holes have been there at different times. In the fall of 1910 there were at least six of them. In 1908 there was a place over there at the road where the dam was built. In 1908 I fenced around this one place to keep the cattle from destroying the tile. We put the fence there some time about the first of May, 1908, and I moved it in the fall of 1909. I took the fence down and hauled dirt to cover the tile up. There were holes there in 1912. They had sent some men in my field to repair the ditch; they filled it up in places and dug down into the holes and banked it up."

In 1909 and 1910, plaintiffs laid a tile drain, from the pond into which that previously mentioned emptied, southerly into a ditch in the southwest quarter of the section, and D. L. Pascal for them stopped the tile defendant had laid a few rods west of the line fence in their land in or near the lower pond. The obstruction was removed by an employe of defendant in 1912, but again replaced by Pascal. Thereafter, defendant began laying a drainage tile connecting with that at the lower pond in her land and extending north to the tile carrying the surface water from her north 80, when this action was begun, aided by a temporary writ of injunction restraining her from proceeding. A cross-petition was filed praying that plaintiff be restrained

from interfering with the tile drain laid by her husband and father-in-law in plaintiffs' land, and from preventing defendant's entering on their land for the purpose of repairing and maintaining the same. On hearing, the court dismissed both the petition and cross-petition, and both parties appeal.

I. The tile drain constructed by Martin Hynes in 1893 carried the water from the pond north of the road into the swale on plaintiffs' land. The drain was laid with the then

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| 1. WATERS AND
WATER-
COURSES :
agreed system
of drainage :
statute of
limitation :
easement. | owner's consent and the surface water carried through it from defendant's land, as well as part of plaintiffs', with the acquiescence of the latter, the then owner under whom they claim, until 1904, more than ten years, by reason of which defendant has acquired a prescription right to the use of the drain in plaintiffs' land. <i>Hatton v. Cale</i> , 152 Iowa 485; <i>Dorr v. Simmerson</i> , 127 Iowa 551; <i>Vannest v. Fleming</i> , 79 Iowa 638. |
|---|---|

Plaintiffs contend, however, that defendant has abandoned this easement by beginning the construction of the tile drain from the lower pond north in her land with the purpose of carrying the surface water above the

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| 2. WATERS AND
WATER-
COURSES :
easement in
drainage sys-
tem : aban-
donment :
facts not
constituting. | road which had flowed through the tile into plaintiffs' land. They had closed the drain at or near the lower pond so as to prevent drainage in that direction, and undoubtedly defendant had begun tiling through her own |
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land in order to avoid farther controversy. But she had not completed the work or connected with the pond at the highway and was interrupted by this suit from carrying out her undertaking. She may have entertained the design to yield the other drain if this proved successful in carrying off the water, but there is nothing in the record indicating more. Even this much had been forced upon her by the tactics of plaintiffs in stopping the tile and insisting that it continue closed.

To constitute an abandonment, two elements are essential, (1) the intention to abandon and (2) the act of abandoning. Unless an easement is actually relinquished, it cannot be said to have been abandoned, regardless of what the intention may have been. 1 Corpus Juris 6. Whatever may have been the design of defendant, what she had done in laying the tile in her land and temporarily acquiescing in plaintiffs' interference with the drain in their land rather than enforce her rights in court did not amount to the abandonment of her right to the easement.

II. In 1904, the drain was extended south through plaintiffs' land to the lower pond and additional tile was laid the next or second year extending into defendant's land, so that, as we understand, the water would empty into the pond at different places. This was done under agreement between defendant's husband, who then owned the land, and D. L. Pascal, the former undertaking to keep the drain in repair and contribute half the expense of draining the pond out when the latter elected so to do. From this recital, it is manifest that no waiver of the existing easement was involved in entering into this agreement. On the contrary, it recognized the right of defendant's husband to cast the surface water from his land into the swale in plaintiffs' land and undertook to dispose of it further. Nothing to the contrary appears in *Robinson v. Luther*, 140 Iowa 723. In *Raleigh v. Clark*, 71 S. W. (Ky.) 857, relied on by appellant, the parties had agreed that an existing ditch be extended and that Clark should keep that excavated in Raleigh's land to a creek cleaned. This he failed to do, and the trial court instructed that no damages could be recovered for injury caused by water flowing through the existing ditch if it had been in operation fifteen years, even though Clark failed to keep his agreement, and but for such failure the injury would not have occurred. This was held to be error for that Clark, having received the benefit of his agreement, must assume the burden, and that, having undertaken that the water be carried off

in a manner different than through the existing ditch, he thereby waived any right to have it carried off as before. Under the agreement of 1904 in the case at bar, the water was to be carried through the tile laid in 1893 as before, the only change being that it was carried through the tile then laid rather than on the bottom of the swale. There was no waiver of the easement to carry the surface water through the tile in plaintiffs' land.

III. It may be conceded that the tiling laid by defendant's husband in plaintiffs' land got out of repair at different times and that defendant did not restore it in the manner exacted by the agreement. Nothing

3. WATERS AND
WATER-
COURSES:
easement in
drainage sys-
tem: when
revocable:
failure to re-
pair.

appears to have been said concerning the manner of enforcing this agreement, so that the right to forfeit or revoke the license to extend the drain is not to be inferred unless the license was naked and without considera-

tion. See *Jones v. Stover*, 131 Iowa 119; *Ruthven v. Creamery Co.*, 140 Iowa 570.

But the agreement was based on mutual considerations. The land of defendant was better drained of the water settling in the ponds. The plaintiffs' land was benefited by carrying the water to an existing pond, instead of pouring it about 10 rods south of the road, and by the incidental drainage of the swale on each side of the tile for a distance of 60 rods. At great expense to defendant's husband, the improvement was made and for the mutual benefit of the parties and, resting on these considerations, the license is not revocable. *Ruthven v. Farmers Co-operative Creamery Co.*, 140 Iowa 570. The remedy of plaintiffs is not through revocation but, upon defendant's refusal or omission on demand, to repair the tile drain and exact recompensation for the expense thereby incurred. See *Robinson v. Luther*, 140 Iowa 723.

IV. The testimony of Pascal that the tile drain being

constructed by defendant would increase the flow of water into the lower pond evidently was based on the supposition that the drain through plaintiffs' land would be closed. With that open, there would be no material increase and the court rightly dismissed plaintiffs' petition praying that the construction of the tile drain by defendant be enjoined.

The relief prayed by defendant, i. e., that plaintiffs be enjoined from interfering with tile drain constructed by defendant and his father in plaintiffs' land and with defendant's repair and maintenance thereof, should have been granted.

Affirmed on plaintiffs' appeal, *reversed* on defendant's appeal.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

JACOB BLAKE, Appellee, v. THE CITY OF BEDFORD, IOWA,
Appellant.

EVIDENCE: Expert or Opinion Testimony—Detail of Facts—When

- 1 **Not Necessary.** A physician who professes to speak from his personal observation, examination and treatment of a patient may properly express an opinion based thereon, without first detailing all that he has learned from his examination and treatment of the patient. The accuracy and reasonableness of his opinion, if questioned, may be tested on cross-examination.

EVIDENCE: Conclusions—When Harmless—Detail of Fact. The

- 2 statement of a conclusion by a witness is rendered harmless if, in connection therewith, the facts upon which the statement is based are detailed to the jury.

PRINCIPLE APPLIED: The witness stated that a sidewalk was in "bad shape." In connection therewith, he stated that the boards for a long time had been loose, stringers rotten, and boards frequently out of place. *Held*, if the statement that the walk was in "bad shape" was a conclusion, it was rendered harmless by the detailed facts.

MUNICIPAL CORPORATIONS: Sidewalks—Second-Hand Material

- 3 **—Notice of Defect.** That a sidewalk was built of second-hand

materials, such fact being known to members of the city council, is admissible on the question of notice.

EVIDENCE: Negligence—Defective Sidewalks—Repairs Subsequent

- 4 **to Injury—For What Purpose Admissible.** Evidence that a walk was taken up and repaired after an injury may be admissible, not to show negligence on the part of the city, but, if material, to show that the walk at time of trial is not in the same condition as at the time of the injury. If admitted, and defendant desires the evidence to be so limited, it should so request the court.

EVIDENCE: Life Tables—Expectancy of Life—Disputed Permanent

- 5 **Injury.** Life tables showing expectancy of life are admissible when the permanency of the injury is a fair question for the jury.

LIMITATION OF ACTIONS: New Cause of Action—Expanding

- 6 **Claim by Amendment.** An amendment to a petition, "expanding or elaborating" the allegations of the petition already filed, sets up no new cause of action, rendering the claim subject to a plea of the statute of limitation.

PRINCIPLE APPLIED: The original petition declared on injuries "to back, left hip and leg, rupturing and injuring the tendons, muscles and attachments of his back, left hip and leg," and alleged actual notice. The amendment set up that the left hip bone was broken and that on account thereof he had been obliged to incur an operation and attendant expense. It also elaborated the defective condition of the walk and alleged both actual and constructive notice. *Held*, no new cause of action was set up.

INSTRUCTIONS: Erroneous in Part—Correct as a Whole—Negli-

- 7 **gence.** An instruction which may have been objectionable as submitting the question of the negligence of a city in the original construction of the sidewalk, when no negligence in that respect was charged, is not error when the instruction, construed as a whole, obviates the objection.

INSTRUCTIONS: Repetition of Statements of Law—Non-Necessity.

- 8 The court need not and cannot in every sentence or in every paragraph attempt to restate all the law applicable to each phase of the controversy. It is sufficient if the law be stated with substantial accuracy in the instructions as a whole.

MUNICIPAL CORPORATIONS: Defective Streets—Notice to Com-

- 9 **mittee.** It is a matter of judicial knowledge that the duties of a

city with reference to streets are ordinarily performed, to a great extent, by a committee having special charge of such streets. Therefore, the court did not err in stating to the jury that notice of a defect in a sidewalk brought home to such committee would be notice to the city, especially when at least one member of the committee was identified as having such notice.

NEGLIGENCE: Recovery Without Negligence—Instruction Not
10 **Authorizing.** Instruction, in instant case, reviewed and held not to authorize a recovery without proving negligence on part of defendant or to recover damages other than those pleaded.

Appeal from Taylor District Court.—HON. THOS. L. MAXWELL, Judge.

SATURDAY, FEBRUARY 20, 1915.

REHEARING DENIED FRIDAY, MAY 7, 1915.

ACTION at law to recover damages for personal injury caused by the alleged negligence of the defendant. Judgment for plaintiff and defendant appeals.—*Affirmed.*

Frank Wisdom, G. B. Haddock and Flick & Flick, for Appellant.

McCoun & Brant, for Appellee.

WEAVER, J.—The plaintiff alleges that the defendant city negligently permitted one of its sidewalks to become defective, out of repair and unsafe for public use, and that by reason of such defective condition of said walk the plaintiff, while lawfully using the same, was tripped or thrown down without fault or negligence on his part, thereby sustaining serious bodily injuries for which he asks a recovery in damages.

Answering the petition, defendant denies all allegations of negligence on its part and further avers that at the time of the alleged injury plaintiff knew, or should have known, that he was in such physical condition as to render it unsafe

for him to travel on any sidewalk and his injury, if any, is chargeable to his own negligence.

There was a trial to a jury and verdict and judgment for plaintiff in the sum of \$2,750.

There was evidence tending to show that plaintiff was about sixty years old, was a resident of Bedford, and the injury of which he complains occurred on or about July 6, 1912. Prior to that date, on September 29, 1911, plaintiff had fallen from a ladder and received more or less injury. He is a laborer and when well had an earning capacity of \$2.00 to \$2.25 per day. The evidence further tends to show that in the fall from the ladder plaintiff sustained what the surgeons call an impacted fracture of the neck of the femur, a fracture in which the broken parts of the bone are driven or forced together. From this injury he appears to have been disabled for several months, but prior to the time of the injury in this case there is evidence that he had so far recovered as to be able to walk with crutches and then with crutch and cane and to perform some work in the garden and various kinds of other light manual labor. The expert evidence fairly sustains the conclusion that a union of the broken bone or a fibrous union by which the bones were held in position had taken place and that plaintiff was making progress toward a more or less complete recovery, though such progress was necessarily slow, and plaintiff's restoration to the full measure of strength and physical capacity which he had enjoyed before his injury was perhaps doubtful. On the day mentioned in the petition, he was walking with the aid of crutch and cane in company with another person, when one of the sidewalk boards flew up or tipped in such manner as to catch his foot or crutch, throwing him down. Being unable to walk, an automobile was called and he was carried home. The next day he was taken to a neighboring town to consult a doctor. He continued to complain of the alleged results of his last fall, and tried different remedies, until the following February, when a surgical operation was performed in which

an incision was made through the flesh to the joint and a nail driven up through the neck of the bone in an attempt to join the broken parts and set up an irritation which it was hoped would stimulate the growth of new bony substance and provide a more or less complete union. The examination then had disclosed a fibrous union which to some extent compensated for the loss of the use of the bone, but the extent of the benefit, if any, to be derived from the surgical operation appears still to have been a matter of doubt at the time of the trial. Plaintiff's damages were assessed by the jury at \$2,750.

The errors assigned by appellant are entirely too numerous for separate consideration and discussion, but we shall endeavor to so group them that nothing of a material character will be omitted.

I. A physician who was shown to have personally examined and treated plaintiff for his injuries was asked for his opinion whether a union, bony or fibrous, of the broken bone had taken place prior to the plaintiff's fall on the sidewalk. In this question the witness was asked, among other things, to speak from his examination and observation of the patient, and over the objection of the defendant he was allowed to answer. It is said in support of the objection that the physician should not have been allowed to answer until he had first detailed to the jury all that he had learned or discovered in his examination and treatment of the patient. But such is not the rule as we understand it. If a witness is testifying purely as an expert, pronouncing an opinion solely upon a hypothetical state of facts, then, of course, it is the right of the opposing party to insist that the question shall disclose all the facts upon which the opinion is to be pronounced; but if the witness be a physician who professes to speak from his personal observation, examination and treatment, he may properly express an opinion based thereon, it being, of course, the privilege of counsel on the other side by cross-examination to test its accuracy and reasonableness.

1. EVIDENCE:
expert or opinion
testimony:
detail of
facts: when
not necessary.

As to the other objection, that the interrogatory assumed the existence of facts not shown, we think the question as stated is not without support in the record. It is moreover to be said that the answer given by the witness was of a very indefinite character and not calculated in any way to prejudice the defendant. It was in substance that in his opinion either a bony or fibrous union of the broken parts had taken place. This was disputed by no one, and the subsequent surgical examination disclosed a fibrous union.

A witness upon the condition of the sidewalk described it as in "bad shape." In the same connection, he proceeded to tell what he observed of its condition—that

2. EVIDENCE:
conclusions:
when harmless:
detail of fact.

for a long period the boards were loose, stringers rotted and boards were frequently out of place. This fully explained what the witness meant by "bad shape," and even if that expression should have been stricken out (which we do not decide), its retention in the record was not prejudicial.

Plaintiff's son testified to a conversation with one Humphreys, in which he called the attention of the latter to the fact that when this walk was put in or replaced

3. MUNICIPAL
CORPORATIONS:
sidewalks:
second-hand
material:
notice of
defect.

it was done with second-hand material, and upon the admission of this evidence error is assigned. It is shown, however, that Humphreys was a member of the city council and a member of the committee on streets and the testimony was competent as tending to show notice to the city.

Testimony was admitted tending to show that the sidewalk at the place in question was repaired or renewed soon after the plaintiff's fall thereon. The same fact had already been voluntarily brought out by defendant

4. EVIDENCE:
negligence: defective
sidewalks: repairs
subsequent to
injury: for
what purpose
admissible.

upon cross-examination of one of the plaintiff's witnesses. It had also been testified to by the same witness on direct examination without objection. The fact was not necessarily incompetent or irrelevant. Under the rule which has been applied in this state, proof of subsequent repair does

not imply any admission by the defendant of the alleged defect; but ordinarily it is competent to show, if such be the case, that the walk as it exists at the time of trial is not in the same condition as when the alleged injury occurred. Had the appellant requested it, the court would doubtless have instructed the jury properly limiting the use to be made of this testimony, but such request was not made and the exception to its introduction cannot be sustained. *Frohs v. Dubuque*, 109 Iowa 219.

Plaintiff was also permitted to show that the expectancy of life of a person of plaintiff's age is fourteen years. The admissibility of this fact in evidence is denied on the theory that there was no testimony upon which the jury could properly find that the injury, if any, which plaintiff sustained is permanent.

5. EVIDENCE:
life tables:
expectancy of
life: disputed
permanent
injury.

As we read the record, there is an abundance of evidence to support that conclusion. There is, of course, more or less uncertainty as to how much of plaintiff's crippled condition is due solely to his first injury and how much to his fall on the sidewalk; but the inquiry is not to be disregarded as a mere matter of conjecture and it was within the province of the jury to find the fact according to its best judgment from all the circumstances developed on the trial. There was direct and explicit evidence that, at the time of his fall on the walk, plaintiff had to a very material degree recovered from his first injury. It is shown that he worked in the garden, split wood and did the ordinary chores about his home. The physician in charge of the case says of him at that time that he could put his whole weight upon that leg, could squat down and pick up things and could cross his legs. There is other evidence of the same general character. These statements, if believed by the jury, clearly justified the conclusion that prior to the last injury a fairly serviceable union—either bony or fibrous—had taken place or was in process of development. After his fall on the walk and up to the time of the trial, plaintiff had been unable to walk except on crutches. He had not been able to perform any

labor. There was still a distinct crepitation indicating a movement or friction between the broken parts of the bone and a failure of union between them. None of the surgeons gave any confident assurance or expressed any positive hope of his ultimate recovery. True, one of the experts declined to say whether plaintiff was in any worse condition at the time of the trial than he was immediately before the second injury; but in the same connection said it was impossible for him to say whether the injured man would or would not have a better limb by reason of the surgical operation than he would have had without it or without the second injury, and concluded with the remark, "To let him get along the best he can is all that can be done for him." From this and other testimony along the same lines, including the plaintiff's age, considered in the light of the ordinary observation and experience of mankind, it is difficult to conceive how a jury could do otherwise than say that the injury of which he complains is of a permanent character. The fact that plaintiff had sustained a prior injury is, of course, material; but it constituted no defense to this action if he has succeeded in showing to the satisfaction of the jury that, by reason of the defendant's negligence with respect to its sidewalk, he was made to fall, without fault on his part, and thereby received other or additional or increased injury. Under the issues joined and the evidence offered, these were questions for the jury, as was also the question whether the injuries, if any, were of permanent character. The life tables were therefore properly admitted.

II. The petition as originally filed stated the injuries of the plaintiff to be to his back, left hip and leg, rupturing and injuring the tendons, muscles and attachments of his back, left hip and leg, and that such injuries were permanent. Thereafter, an amendment to the petition was filed stating that, in addition to the injuries described in the original pleading, plaintiff's left hip bone was broken and that, on account of said injuries, he had been obliged to undergo

6. LIMITATION
OF ACTIONS:
new cause of
action: ex-
panding claim
by amend-
ment.

a surgical operation and incur large expense. It also stated more elaborately the alleged defective condition of the sidewalk where plaintiff fell, and that the city had both actual and constructive notice of such conditions in time to have repaired it before the alleged accident. To this amendment defendant pleaded the statute of limitations. In its charge to the jury the court did not submit the issue of the statute of limitations, and to this omission the defendant has taken exception.

The amendment stated no new cause of action. Stated briefly, the cause of action as originally alleged was the injury claimed to have been sustained by the plaintiff by reason of the defendant's negligence in the maintenance of the sidewalk. The amendment does no more than to vary and expand or elaborate the allegations made in support of the cause of action already declared upon and relates back to the commencement of the action. In no proper sense of the word is it a statement of a new cause of action. See *Gordon v. C. R. I. & P. Ry. Co.*, 129 Iowa 747.

So also of the point made by appellant that the original petition charges the city with actual notice of the defect in the walk, while the amendment alleges both actual and constructive notice. The essential ultimate fact to be alleged and proved was notice to the city, and the further inquiry whether the notice was actual or constructive was solely a question of evidence and the amendment in this respect did not materially change the effect of the pleading. Indeed, we are of the opinion that the case which plaintiff made upon the trial would have been provable to the same extent had the amendment not been filed.

III. Exceptions to the court's instructions

7. INSTRUCTIONS :
erroneous in
part : correct
as a whole :
negligence.

to the jury, so far as the points thus raised
are not governed by the conclusions we have
already stated, are as follows :

Of the duty incumbent on the city, the court said to the jury :

"It is the duty of the defendant city, in the exercise of its corporation power, to construct and maintain sidewalks along its streets, and it must exercise ordinary and reasonable care in such construction and use ordinary and reasonable diligence to see that such sidewalks are maintained in a reasonably safe condition for public travel, and a failure on its part to exercise such ordinary and reasonable care and diligence in these respects would constitute negligence for which it would be liable."

If we understand the exception taken to this statement of the law, it is that the court submits to the jury the question of the original construction of the walk when no negligence in that respect is charged. But the language quoted is only a part of the paragraph in which it is found, and, when read as a whole, it appears that, after stating the general rule as above, it proceeds to instruct the jury specifically that, as applied to the case on trial, plaintiff must show that, if the city allowed its walk at the place in question to become out of repair and to remain in a dangerous and unsafe condition, then the finding of negligence on its part would be justified, provided that notice had been shown or the defective condition had existed for such a length of time that the city ought to have discovered it. There is nothing in this instruction of which the defendant can justly complain.

In another part of the same paragraph, the jury were told that, before finding the defendant negligent, notice of the defect, actual or constructive, must be shown and the city must have had reasonable opportunity to repair it. This charge is criticised because it does not state with sufficient elaboration what would be a reasonable time for such purpose.

8. INSTRUCTIONS:
repetition of
statements of
law: non-
necessity.

Again the court referred to the subject and called the jury's attention to the necessity of notice to the city "in such time that the defendant might have repaired the same" before the injury to the plaintiff. This statement is objected to because

the court did not repeat what it had just said as to the matter of reasonable time in which to make repairs.

The objections are to a great extent overdrawn and savor of hypercriticism. Reading the entire paragraph, it shows careful regard on the part of the court for the rights of the defendant. The court does not and cannot in every sentence or in every paragraph attempt to repeat or restate all the law applicable to each and every phase of the controversy. It is to be assumed that the jury have at least average intelligence and fairness of mind and will give heed to the entire charge of the court according to its evident meaning, and there is nothing in the language to which appellant's objections refer which appears capable of misleading them to the defendant's prejudice. The rule as stated in the charge has the uniform support of the authorities.

It is further objected that the court erred in charging the jury that notice to the mayor of the city or its councilmen or street commissioner or committee on streets and alleys would be sufficient for the purposes of the law.

9. MUNICIPAL CORPORATIONS: defective streets: notice to committee. The objection is directed specially to the reference made to the city's committee on streets.

It is said the law knows no such office or officer and the committee may be composed of officers or persons not members of the council. But the court is not required to shut its eyes to the ordinary methods of business. It is a matter of common knowledge that the duties of city councils are ordinarily performed to a great extent through the agency of committees of their membership, and among these is usually a committee having special charge and oversight of the public ways within the municipality. Moreover, it appears affirmatively in this record that the defendant city had such a committee and, while its membership generally is not disclosed, one of its members was identified and evidence introduced tending in some degree to show knowledge or information on his part as to the walk in controversy. Under such circum-

stances, the court did not err in telling the jury that notice to its street committee was notice to the city.

The court further charged the jury,—“If you find that the plaintiff in passing along said sidewalk in company with another person who stepped upon a loose plank or board in

10. NEGLIGENCE: recovery without negligence: instruction not authorizing. said sidewalk, in such a way that the same became detached, and tripped, and threw the plaintiff to the ground and that as a result thereof, that his hip and limb were fractured,

bruised, or otherwise injured, then you will be justified in finding that plaintiff was injured by reason of said defective condition of said sidewalk, and the nature and extent of such injury it will be your duty to determine from the evidence.”

This the counsel for appellant construe as a direction to the jury that, if they find the defendant was injured by tripping over a loose board in the walk, then a finding would be justified that he was thus injured by the negligence of the city. This is a palpable misconstruction of the court's language. The quoted language makes no reference whatever to the negligence of the city and does not even by remote inference suggest to the jury that the finding of the facts therein mentioned would support such a conclusion. The court was here speaking only of the question whether the walk was in fact in a defective condition and whether by reason thereof plaintiff fell and was injured. In other words, it here directed the jury's attention to the first of the several things, all of which plaintiff must prove in order to recover. The subject of defendant's negligence, if any, with respect to such condition is not here spoken of but is fully and sufficiently treated of in another paragraph.

Further objection is urged to the use of the words, “otherwise injured,” it being said this allowed the jury to find damages for injuries not mentioned in the pleadings. There is no merit in this proposition. Plaintiff did declare that his “hip and leg were fractured, bruised or otherwise injured.” The

instruction properly uses the same form of expression. The allegation was broad enough to support a recovery for any material injury of which there was evidence to the hip or leg, whether it was or was not specifically or technically described in the petition, if the charge of negligence was sustained by the testimony and plaintiff was otherwise shown entitled to recover.

Numerous other objections are raised to the instructions and argued by counsel, but we cannot protract this opinion for their more specific consideration. To some extent, the questions so suggested are fully covered by the rulings we have already made. And as a whole it must be said of them, as we have before intimated, that they subject the language of the court to an overrefinement of criticism which, if followed by this court, would render it practically impossible to make a record capable of standing the test of an appeal. Substantial correctness in the statement of the legal principles applicable to issues tried to a jury is all that can be expected, and judgments are not to be reversed and litigation prolonged unless error appears which we may reasonably suppose to have affected the result of the trial to the prejudice of the losing party. We find nothing of this kind in any of the instructions challenged by the appellant.

IV. It is finally argued that the verdict is without sufficient support in the evidence. It is enough to say in overruling this objection that practically every material fact put in issue, the negligence of the defendant, the injury thereby to the plaintiff, contributory negligence of the plaintiff, the extent of his injury, if any, are the subject of a conflict of evidence and therefore necessarily matters for the jury. The veracity of the witnesses, the weight and value of their testimony, and the preponderance of the evidence are questions with which the court has nothing to do. They have been found and decided by the jury against the defendant, and

there being no apparent prejudicial error in the record, that verdict must stand.

The judgment appealed from is—*Affirmed*.

DEEMER, C. J., EVANS, PRESTON, LADD, and GAYNOR, JJ.,
concur. SALINGER, J., not sitting.

C. E. COOPER, Guardian, Appellee, v. HATTIE E. OLSON et al.,
Appellant.

DIVORCE: Property Rights—Conveyance by Wife Before Decree—

- 1 **Effect.** A former husband cannot, after his former wife has secured a divorce from him, complain that, while the marriage relation existed, his wife, having received a conveyance of land from a trustee who held the title in trust for her, altered the said deed by erasing her own name as grantee and inserted in lieu thereof the name of a person to whom she sold the land, the decree of divorce being silent as to the property rights of the parties.

EVIDENCE: Transactions with Deceased—Objections—Waiver. A

- 2 party objecting to testimony and a witness because incompetent under Sec. 4604, Code, as calling for personal communications on a certain point in issue with a party insane, waives such objection by adopting such testimony "as his own testimony," even though in such adoption he attempts to preserve his former objections. In other words, such party after making such a record will not be permitted to insist on the probative force of that part of such "communications" as is favorable to him on a particular issue, and to deny the probative force of that which militates against him on the same point in issue. He must take all or none.

TRUSTS: Resulting Trust—Evidence—Sufficiency of. Evidence re-

- 3 viewed and held that plaintiff, seeking to establish a trust in land because of having furnished the money with which to purchase the same, had not met his burden of proof.

Appeal from Monona District Court.—HON. GEORGE JEPSON,
Judge.

TUESDAY, FEBRUARY 9, 1915.

REHEARING DENIED FRIDAY, MAY 7, 1915.

ACTION in equity by C. E. Cooper, as the guardian of Ole Olson, an insane person, to quiet title to certain real estate and to set aside and cancel a certain deed and mortgage thereon. By its decree, the trial court set aside the deed to the eighty acres of land in controversy, from the surviving widow and heirs of O. E. Strand to defendant Bernard, cancelled the mortgage given by defendant to Hattie E. Olson, and quieted title in Ole E. Olson as against defendant Hattie E. Olson and as against defendant Henry Bernard, except as to the mortgage on said land to Monona County, which was paid off and satisfied by said Bernard. The decree subrogated Bernard to the rights of the county. The defendants appeal. —*Reversed.*

J. A. Prichard, Griffin & Page and *H. B. Walling*, for appellants.

J. W. Anderson, for appellee.

PRESTON, J.—The substance of plaintiff's claim is, that his ward, Ole Olson, is an insane person, confined in the hospital at Cherokee; that his ward is the owner of the eighty acres of land described in the petition; that the record title to said land was in Ole Strand; that said Strand having departed this life, a conveyance was fraudulently procured from his heirs, conveying the land to defendant, Hattie E. Olson; that the defendant Bernard knew of and participated in the fraud, and that it was the purpose to defraud the estate of Ole Olson.

The defendants deny any fraud; defendant, Hattie E. Olson, claimed the land as her own; that it was the agreement between her and her husband and Ole Strand that, when the mortgage against the land was paid, it should be conveyed to said Hattie. She further claimed that since the bringing of

the suit she has been divorced from Ole Olson; that she had conveyed the land to Henry Bernard for a valuable consideration, and joined with Bernard in asking to have the title quieted in him; Bernard asked the same relief.

It is conceded by counsel for both sides that the questions involved are of fact, and we think the case turns on substantially one point, and that is whether the \$600.00 profit on

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|---|--|
| 1. DIVORCE:
property
rights: convey-
ance by wife
before decree:
effect. | forty acres of land that had been sold and invested in the eighty acres in controversy belonged to the plaintiff, Ole Olson, or his former wife, the defendant, Hattie E. Olson. |
|---|--|

The trial court was of opinion, although from his finding of facts he seems not to have been very clear, that it belonged to Ole, and that, therefore, there was a resulting trust in favor of Ole Olson. Before plaintiff would be entitled to recover, he must show, the burden being upon him, that such is the fact. If it is not so shown, or if it appears that the money belonged to the defendant, Hattie E. Olson, or there was an agreement, afterwards carried out, that Strand, the person holding the record title to the eighty acres in controversy, should convey the land to the defendant, Hattie, then plaintiff would not be entitled to the decree. There is no dispute between counsel as to the law.

The trial court in its decree made a finding of facts substantially as follows:

“1st: That the land in controversy was purchased from one, Charles Chrisman, the negotiations therefor being carried on by Ole E. Olson, the purchase price thereof being \$1,200.00, \$600.00 of which was then paid in cash, the deed therefor being made to O. E. Strand, an uncle of Ole E. Olson, the balance of the purchase price being represented by a mortgage to Monona County, and that no part of the purchase price was paid by said O. E. Strand.

“2nd: That the \$600.00 paid on said purchase price was

the money of Ole E. Olson, and while there is some competent evidence to show that Ole E. Olson stated that he would give or had given this money to his wife, Hattie E. Olson, the most that can be said is that he would give said money to her, but there never was any completed gift to her of said money.

"3d: That Ole E. Olson shortly after the conveyance of the land to O. E. Strand moved upon the same with his family and lived thereon with them as their homestead for about seven years, or until about eight years ago when he was declared insane, and since then has been confined in the Hospital for the insane at Cherokee, Iowa, and after his commitment his wife, Hattie E. Olson, and family continued to live upon said land as their homestead until about March 1st, 1912.

"4th: That O. E. Strand died about eight years ago without having in any manner sold or conveyed the land in controversy.

"5th: That in the fore part of 1912 Hattie E. Olson sold said land to the defendant, Henry Bernard for \$3,900.00, and requested the surviving widow and heirs at law of O. E. Strand to convey said land to her, and that they did execute a deed to her therefor.

"6th: That upon receipt of such deed from the widow and heirs at law of O. E. Strand the name of Hattie E. Olson, the grantee, was erased and the name of the defendant, Henry Bernard, inserted in lieu thereof as grantee, and that the same was done with the knowledge and consent of Henry Bernard who knew that the husband of Hattie E. Olson was then alive and insane. That such change of name and grantees was without any authorization upon the part of the persons who executed said deed.

"7th: That the consideration to be paid by the defendant, Henry Bernard, was the sum of \$3,900.00, \$2,100.00 thereof having been paid in cash, \$600.00 of which was paid by satisfying the mortgage then against said land due and owing to Monona County, that \$1,800.00 of said purchase price was rep-

resented by defendant, Henry Bernard, giving to the defendant, Hattie E. Olson, a note for that amount, secured by a mortgage back on the land, which note and mortgage is still owned by the defendant, Hattie E. Olson.

"8th: That in March, 1913, the defendant, Hattie E. Olson, was divorced from her husband Ole E. Olson in an action brought by her against him, and that the relation of husband and wife no longer exists between them; that in the divorce action no alimony was asked for and no mention made nor decree entered as to their property rights.

"9th: That while the evidence is not clear or satisfactory as to the reason for placing the legal title to said land in the name of O. E. Strand, the Court does not find that Ole E. Olson did so in fraud of creditors.

"Upon the foregoing findings of fact the Court had reached the following conclusions of law:

"1st: That O. E. Strand held the title to the land in controversy in trust only, and upon his death whatever title, if any, passed to his surviving widow and heirs the same was burdened with the same trust conditions upon which O. E. Strand held the same.

"2d: That there is no competent evidence of an express trust, but that the trust was a resulting one and for the benefit of the person paying the purchase price.

"3d: That the purchase price of to wit: \$600.00 was the money of and paid by Ole E. Olson, and that O. E. Strand held the legal title in trust for him, and that whatever title was held by the surviving widow and heirs of O. E. Strand after his death was held by them in trust for Ole E. Olson and charged with such trust.

"4th: That the deed of conveyance executed by the surviving widow and heirs at law of O. E. Strand to Hattie E. Olson did not convey said land to her free from such trust, and that the defendant, Henry Bernard, by the erasure of the name Hattie E. Olson as grantee and the insertion of his name

as grantee in place thereof gave him no better title than could have been conveyed to Hattie E. Olson by said deed.

"5th: That the note and mortgage given by Henry Bernard to Hattie E. Olson should be held to be without consideration and void, and the mortgage no lien upon said land.

"6th: That the sum paid by the defendant, Henry Bernard, in paying off and satisfying the mortgage to Monona County, together with interest thereon, as provided for by said mortgage, the said defendant, Henry Bernard, should be subrogated to the rights of Monona County, and have a lien against said land for said sum."

We cannot agree with the finding of the trial court as to the second finding or the third conclusion of law, in so far as it holds that the title to the land was held in trust by Strand for the benefit of Ole E. Olson because he paid the money, and we feel that we ought to set out a part of the testimony and so much as bears upon the question indicated.

The record presents a peculiar situation. The plaintiff had the burden to show that the title to the land in question was held by Strand in trust for him, and to prove the alleged fraud. The only evidence introduced by plaintiff in the first instance was witness Hofmann, who testified that the deed executed by the widow and heirs of O. E. Strand, in which the grantee now appears as Henry Bernard, contained the name of Hattie E. Olson, when first received, and that he changed the name of the grantee by erasing the name of Hattie E. Olson and putting in that of Bernard; that this was done at the request either of Mrs. Olson or Campbell, who was acting for her, and that it was done to save making another deed.

On cross-examination of this witness by defendants, the proper foundation was laid for a letter from the widow of O. E. Strand, which was then introduced in evidence, without objection. This letter is as follows:

“Berthoud, Colorado,
April 16, 1913.

Mr. J. A. Prichard, Attorney,
Onawa, Iowa.

Dear Sir:

Some friends of mine in Monona County has written me that Mrs. Hattie Olson's daughter and husband are trying to get the home away from her. Mr. Ole Olson was Mr. Strand's nephew and if Mr. Strand was living he could tell you as well as I, that the home rightly belongs to Mrs. Olson, for she has always worked hard and has kept up the interest on the home since he was taken to the asylum. Mr. Strand bought her three turkeys one year so she could raise turkeys and make some money that way. I tell you when a man comes home drunk, and makes his wife take care of the team in the middle of the night, it is something awful. Then he used to pound her, and pull her hair out by the handfuls, and even took a horse into the house, and tied it to the bed post. Would make her get up in the morning and do all the chores and get his team ready for him, then she would get breakfast ready, before he would get up. Now, if the place does not belong to her, it ought to. I would never have lived with such a man. We always felt so sorry for her. She is a good, hardworking woman. I wish Mr. Strand was alive to write you what he thinks and knows about it. Could tell you more than I can.

Respectfully,
(Signed) Mrs. Alice Strand.”

The Strands made no claim to the land, as shown by the above letter and their willingness to make the deed to Mrs. Olson.

The testimony of plaintiff in chief did not show that plaintiff had paid any of the purchase money on the land in question, but did show only the change in the deed from the Strands to the defendant, Hattie E. Olson. If the land be-

longed to her and she was entitled to a deed from the Strands, the plaintiff could not complain, because he and the defendant, Hattie E. Olson, were divorced, and the decree of divorce was entirely silent as to the property rights of the parties to the divorce case. If the deed was rightfully made out in her name and it was her property, the decree of divorce did not change the situation, but still left it hers. *Cole v. Cole*, 139 Iowa 609.

Before any evidence was taken, the parties stipulated as follows: "This cause coming on for hearing before the court, it is stipulated that defendants may offer their testi-

- mony at this time, in so far as they are able,
2. EVIDENCE: transactions with deceased: objections: waiver. and that the plaintiff shall have until June 1st to file his testimony, and that the same shall be taken in the form of depositions, and when the same are so taken, to be submitted to the court, who shall have authority to examine the same and enter judgment in vacation as though entered during the trial term."

Thereupon, the defendants introduced their testimony, and, at the conclusion thereof, the plaintiff, by his attorney, stated:

"The plaintiff at this time makes the witnesses introduced by the defendants his witnesses and adopts their testimony as plaintiff's testimony, so far as the witnesses themselves are competent, not, however, waiving the objections interposed at the time of the taking of defendants' testimony to that part of testimony of any and all witnesses relating to any personal transaction with Ole E. Olson."

Both parties then rested. The defendants were not required to put in all their testimony until plaintiff had made out his case, but it is said by counsel for appellee that all witnesses were examined who had any knowledge of the transaction, and that, had defendants not put all these witnesses on the stand, plaintiff would have been compelled to put some of them on.

So far then as plaintiff claims to have shown that his money paid for the land, it is shown by the defendants' witnesses, and largely by the testimony of the defendant, Hattie E. Olson, which plaintiff says was incompetent because she was incompetent as a witness to testify against her insane husband; plaintiff objected to a part at least of her testimony on that ground.

The appellant insists that if the evidence of defendants' witnesses is competent evidence for the plaintiff and appellee, then it certainly must be competent evidence for defendants and appellants; that appellee could not be permitted to object to the testimony on the ground of its incompetency and then urge that portions of this testimony should be received, because favorable to plaintiff and to establish his case. It has been held that the party objecting to testimony and a witness because incompetent under the statute does not waive the objection by cross-examination. Plaintiff did cross-examine Mrs. Olson, and, to some extent, at least, beyond the proper limits of cross-examination, although defendants did not object on that ground. We think that if the witness is incompetent to testify to personal transactions, all her testimony on that subject is incompetent, and plaintiff may not consider her testimony as to personal communications between herself and her husband which tend to show, if they do, that the \$600.00 in money paid on the land was the money of plaintiff, and ignore other testimony on the same subject.

3. TRUSTS: re-
sulting trust: rejected, and, if rejected, as before stated,
evidence: plaintiff has not shown that the \$600.00 pay-
ment was made with money belonging to plaintiff. But,
sufficiency of. taking the testimony of the defendant, Hattie E. Olson, all
together, with other competent testimony, or excluding all
of her testimony as to personal transactions and communica-
tions, but considering testimony of other witnesses who are
competent, we are satisfied that this \$600.00 is not shown to
have been money of plaintiff. It does not appear, even from

the testimony of Mrs. Olson, that plaintiff ever had possession of or handled the money. So far as the record shows, when the first forty acres was sold for \$1,200.00 and \$600.00 retained by Strand for money which had been advanced by him, the \$600.00 profit on that land may have been handled by Strand himself in the purchase of the eighty acres in controversy, or by plaintiff's wife, or both plaintiff and his wife. While it is true in a sense, as stated by the trial court, it does not clearly appear that there was a complete delivery to Mrs. Olson, nor does it appear that there was any such delivery or possession of the money by plaintiff. The evidence tends as strongly to show that it was paid to Mrs. Olson as that it was paid to plaintiff. The evidence is not entirely clear at this point on this subject and is somewhat contradictory as to how and by whom the \$600.00 profit on the first land sold was paid on the eighty acres in question. But we are satisfied that plaintiff has not met the burden and shown that he paid it so as to be entitled to the decree. Furthermore, it is quite clearly shown that plaintiff himself agreed with the defendant, Hattie E. Olson, that Strand should deed this land to her if she would go back and live with him, and it was so deeded by the heirs of Strand. We shall refer to this in the testimony of Mrs. McCoy and others, later in the opinion. And it does satisfactorily appear by competent and disinterested witnesses that plaintiff stated that the money did belong to his wife, Mrs. Olson, and the evidence also shows that there was an agreement between plaintiff and Mrs. Olson that if she would go back to live with him, the land should be hers, and that Strand should make a deed of it to her, and the deed was so made by Strand's heirs after his death. We shall set out, as briefly as may be, the testimony bearing upon this question. Mrs. Olson testified, without objection:

Q. "When you were married, what property, if any, did you and your husband have?"

A. "I put it in Ole Strand's name so that Ole Olson

couldn't beat me out of my hard earnings. Ole Olson was a drunkard and went through with everything he made. I wanted to have it put in Strand's name. Ole Strand is dead."

Over objection, she testified:

"The agreement I had with Strand was that he was to convey the land to me. The agreement was that the place was to be put in Strand's name and Strand was to deed it to me whenever I wanted it, whenever I said so. I was to keep up the taxes and interest, pay the principal, and whenever I wanted the place he was to deed it to me. We owed \$600.00 on the place we got from Chrisman. When I sold the farm I paid it out of that money. I paid all the taxes excepting twice. Uncle Strand paid one tax and I think Ole paid one. Ole has been in the asylum eight years. I have paid out close to \$1,000.00 since I have been on the place, and have paid it out of my earnings made off the place. We lived together on the farm from 1898 to 1905, excepting when he would run me off. He would drive me away and I would go back after a while. I have taken care of the children and supported myself since Ole has been taken away."

On cross-examination, she says:

"The \$600.00 we paid on the Chrisman land was the profit made on the sale of the forty acres. It was bought from Charlie Chrisman. My husband and Charlie Chrisman made the bargain, and it was put in Strand's name to be deeded to me. We bought this farm by Ole Strand paying \$600.00 on the land. This was all we paid on the farm. We paid \$600.00 for it and got the money of Ole Strand. Then we moved on the farm and improved it a little and sold it for \$1,200.00. We took \$600.00 of this money to pay Strand the money we borrowed and the other \$600.00 was mine. The deed to the

farm we bought of Chrisman was given to Ole E. Strand, who was Ole Olson's uncle."

The Court: "I believe I am getting a little mixed up on this. Did she just have the two pieces of land?"

Counsel for Plaintiff: "They had three. One was lost on a mortgage, and another they sold for \$1,200.00, and then the Charlie Chrisman land they bought with part of the \$1,200.00. The Chrisman land is the land in dispute. The first piece of land they bought was the forty acres, and that was taken on a loan, and the second piece they got \$600.00 from Strand and bought that piece of land and afterwards sold it for \$1,200.00, and \$600.00 was paid back to Mr. Strand and \$600.00 was paid on the Chrisman land."

Q. "Why was the deed put in the name of Strand?"

A. "Olson went through with every cent he made and got in trouble by selling liquor. Ole was afraid of being sued on account of the liquor business. I have paid the interest on the loan ever since Ole was sent away. He allowed it to be sold and I paid the taxes and redeemed it. Strand had been dead a long time before I knew it. I saw Charlie Chrisman when he was making the bargain, but I was not with them when they made the deal."

Witness Mrs. McCoy, a sister of Mrs. Olson, testifies that she visited them at different times; that after Mr. and Mrs. Olson moved on the Chrisman place she had a conversation with Mr. Olson.

"I talked with Ole E. Olson about this farm and he told me that he had taken \$600.00 of money that belonged to Mrs. Olson and paid it on the place and turned it over to Mr. Strand to hold for Mrs. Olson. He told me he used to run a saloon without a license and he was afraid they might get onto him. She had left him, and he said he promised her half the money that they would get from the other place if they sold it if she would come back, and that he had paid \$600.00 to Strand

and the other \$600.00 to her. I had a conversation with Mr. Strand, and he told me that when she paid the mortgage on the place he was going to see that she got it. That was the day after I had talked with Ole Olson. I do not know whether Ole Olson heard this conversation or not. I couldn't tell how long his mind was bad before he went away. When I was talking with him about the place his mind was all right."

Elmer Olson, a son of plaintiff, twenty-four years of age, and who was only about ten years old at the time the land in question was bought, says he had a conversation with his father, plaintiff, in which he said the land was to be deeded to her; that she had left him several times, and he wanted her to go back.

"He never said anything direct to me. He was talking to my mother. I was present and heard the conversation."

Q. "You heard him say something about its being placed in Strand's name. Now tell the court what you heard him say as to what Strand was to do with the land, if anything?"

A. "He was to deed it to my mother when it was settled up. I can't say exactly, but, as I remember, the \$600.00 was to go to my mother."

Mrs. William Cole testified that she is not related to any of the parties; that she had known plaintiff and defendant for twenty-two years; visited them at their home often; that at one time defendant, Mrs. Olson, came to her house with her face and head bleeding in the middle of the night with the child; that "while she was at my place, and about a week after she came, Ole Olson came there. Both of the children were with Mrs. Olson. I heard a conversation between Mr. and Mrs. Olson at that time with relation to her returning home and upon what conditions she was to return. This conversation was a few months before they purchased the Chrisman farm. He begged her to go home with him. He acknowledged he had always mistreated her, but would treat

her better if she would only go home. She refused to do so for some time. He coaxed her all the afternoon to go back with him and she would not give up to go until towards evening. He said if she would come and go back with him that he would give her the place if he ever mistreated her again. She said she did not care to go; that she was ashamed to go back again because the neighbors knew that he had mistreated her. He told her he would go home and do the chores and he would come back that evening and take her home after dark so the neighbors wouldn't see her, and that if he ever mistreated her again that it would be agreed that the uncle should deed the place to her at any time she wanted it in her name. The place they were living on at that time was in the uncle's name, as also was the Chrisman farm they bought shortly afterwards. So she went home with him."

The evidence shows that plaintiff did mistreat her after the purchase of the Chrisman land and after this conversation.

There is no homestead question in the case, such matter not being relied upon or argued. For the reasons given, we are of opinion that the court erred in holding that there was a resulting trust in favor of the plaintiff and in cancelling the deed and mortgage. The decree should have quieted the title in defendant Bernard. The defendants may have a decree in accordance with the opinion, and such decree may be entered in the district court, or, if appellants so elect, it may be done in this court.—*Reversed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

W. G. CRANDALL et al., Appellees, v. E. E. TROWBRIDGE et al.,
Appellants.

PROCESS: Service—Fraud in Securing—Jurisdiction. Service of process secured through the trickery, deceit or fraud of a party or those acting for him, does not give the court jurisdiction. Record reviewed and held to show that jurisdiction attached—that no fraud had been practiced.

Appeal from Clay District Court.—HON. N. J. LEE, Judge.

WEDNESDAY, JANUARY 20, 1915.

REHEARING DENIED FRIDAY, MAY 7, 1915.

ACTION in equity to cancel notes given by the plaintiffs, one of which was for \$1,200.00 and endorsed to defendant Swenson, the other for \$2,500.00, endorsed by Swenson to Gillespie, and by him endorsed to the Peoples Savings Bank, of Spencer, Iowa. Defendants were not all served and there was no appearance for some of them. Defendant Swenson, who is the appellant, is a resident of Nebraska. Service of original notice was made upon him by the sheriff of Clay County on October 28, 1912, at Spencer, Iowa. He appeared specially for the purpose of objecting to the jurisdiction of the court and moved to set aside the return and service on the ground that he was induced by the fraud of plaintiffs to come to Spencer for the purpose of enabling plaintiffs to serve the notice upon him there. The hearing was had upon affidavits and oral examination of some of the persons making affidavits. Appellant's motion was overruled, and he appeals.—*Affirmed.*

Alvin F. Johnson and Helsell & Helsell, for Swenson, appellant.

Faville & Whitney, for plaintiffs, appellees.

W. W. Cornwall, for defendants, First National Bank and Peoples Savings Bank.

PRESTON, J.—With the merits of the controversy between plaintiffs and defendants, we have nothing to do on this appeal. There has been no general appearance, or plea to, or trial upon the merits, except that the

1. PROCESS :
 service :
 fraud in se-
 curing : juris-
 diction.

Savings Bank has filed an answer. The appearance by defendant Swenson was under Par. 4, Chap. 162, Acts of the Thirty-Fourth General Assembly. The question is, whether plaintiffs practiced a fraud upon appellant, as alleged. It is almost entirely a question of fact. The fraud alleged is, that the presence of appellant in Clay County, Iowa, was procured by plaintiffs upon the representation that if he would come to Spencer, Iowa, he would there have delivered to him an automobile as payment of the \$1,200 note of plaintiffs which Swenson held, and by plaintiffs' concealing from him certain facts which, if he had known, would have caused him not to come within the jurisdiction. Appellant says his presence in Iowa was not voluntary; that plaintiffs' purpose was unknown to him. If the presence of appellant in Iowa was procured by trickery, deceit, or the fraudulent and wrongful acts of plaintiffs, or those acting in their behalf, the court did not obtain jurisdiction, and in that case the motion to quash should have been sustained. Appellant cites upon this point: *Dunlap v. Cody*, 31 Iowa 260; *Mooney v. U. P. R. Co.*, 60 Iowa 346; *Toof v. Foley*, 87 Iowa 8; *Mahoney v. Insurance Co.*, 133 Iowa 570; *Allen v. Wharton*, 59 Hun. 622, 13 N. Y. Sup. 38; *Townsend v. Smith*, 47 Wis. 623; *Van Horn v. Great Western Mfg. Co.*, 37 Kans. 523; *Wood v. Wood*, 78 Ky. 624; *Chubbuck v. Cleveland*, 37 Minn. 466; *Wauzer v. Bright*, 52 Ill. 35; *Heston v. Heston*, 52 N. J. Eq. 91; *Battelle v. Youngstown, etc.*, 84 Tenn. 355; *Frawley v. Casualty Co.*, 124 Fed. 259; *Cavanaugh v. Manhattan*, 133 Fed. 818.

Plaintiffs both signed the notes and were interested in

the California land deal, and were investigating the facts to make defense. They are each chargeable with the acts of the other, or their attorney, as to the service of notice in the action by plaintiffs. *Toof v. Foley, supra*.

It is the claim of appellant that plaintiffs had been planning to have Swenson come to Iowa in order to serve him with notice, and that they concealed such purpose from him. There is no other claim of concealment. If such was not their purpose, then, of course, there was no concealment of it. The evidence, which will be later pointed out, shows that until after Crandall had the conversation with Gillespie on the morning of October 28, and when Crandall supposed Swenson had already started to Spencer, there was no intention to sue Swenson, consequently no fraud or concealment.

Fraud and fraudulent intent and purpose may be inferred from the acts and representations of the parties and all the facts and circumstances shown. *Bean, etc., Mfg. Co. v. Standard Spoke Co.*, 131 Fed. 215. But as between honest and dishonest motives and purposes, we should presume honesty of intent and purpose unless the facts and circumstances are such as to satisfy the mind that the acts and statements relied upon are fraudulent or dishonest.

The legal propositions seem to be settled, so that it is unnecessary to discuss the cases. We do not understand counsel for appellees to controvert the legal propositions in appellant's authorities before cited. They contend, however, that under the evidence there was no fraud or unfairness, and that appellant came voluntarily to Spencer, Iowa. After a careful examination of the record, we are of opinion that the position of appellees ought to be sustained.

Without going too much into detail, we shall state the more important facts appearing in the record. Although the hearing was of a motion, supported by affidavits, with counter-affidavits, the record is voluminous for such a case, and there is necessarily more or less repetition. The facts are, in the main, without substantial dispute, although there

is some conflict as to some of the details which we shall endeavor to point out. To better understand the situation, we shall briefly state the claim of plaintiffs in the action. It is, in substance, that about May 25, 1912, plaintiffs and another contracted for the purchase of land in California; that thereunder \$8,700.00 would be due August 1, 1912; plaintiffs were unable to meet the payment, and in August, defendant Trowbridge represented that defendant Swenson would advance that amount of money if plaintiffs and Trowbridge would execute their note for that amount, which plaintiffs agreed to, and did, do. The note was delivered to Trowbridge for Swenson as security for the money to be furnished by Swenson; that later, in August, 1912, Trowbridge and Swenson represented to plaintiffs that Swenson had forwarded \$8,700.00 to the person in California, to whom it was due, and had accepted as security therefor the note of plaintiffs and Trowbridge, but informed plaintiffs that the note was too large for Swenson to handle and that Swenson desired to have smaller notes given in lieu thereof; that this was done at the request of Swenson, and three new notes of \$5,000.00, \$2,500.00 and \$1,200.00 were given; that Trowbridge, Swenson and one George Gillespie conspired together to induce plaintiff to execute the \$8,700.00 note; that Swenson had not agreed to furnish the money; that Swenson had not sent any money to California, and that the statement that it had been done was false. The \$1,200.00 note, endorsed by Trowbridge to Swenson, and still held by him at the time this suit was brought, and the negotiations for its payment, are involved in this appeal. The \$2,500.00 note is held by defendant Savings Bank, and it has answered, claiming to be an innocent holder.

We shall state the substance of the affidavits and testimony bearing upon the alleged fraud by which appellant claims plaintiffs induced him to come to Iowa. October 4, 1912, plaintiff, Crandall, sent appellant a telegram making inquiry whether he would be at home the next day. Appellant replied by telegraph from Nebraska that he would be at home.

The next day, Mr. Heald, of Spencer, Iowa, an attorney for plaintiffs, saw Swenson at his home in Nebraska. It is shown by the affidavit of appellant, and not disputed by appellees, that at this time Mr. Heald maintained a friendly attitude towards appellant and stated that plaintiffs might have some financial difficulty in meeting some of the notes on the date of their maturity, and that Crandall had recently purchased an automobile, which he desired to sell to appellant and have the purchase price apply as a payment of the \$1,200 note held by appellant; appellant stated to Heald that he would consider Crandall's proposition and requested Heald to have Crandall send a detailed description of the automobile; that Heald also stated that plaintiffs desired to enlist appellant's services in disposing of the land for which the notes had been given. October 15th, Crandall wrote a letter to appellant referring to the conversation between appellant and Heald in regard to procuring appellant's assistance to sell the land and in regard to the sale of the automobile, stating further that he expected to go to Council Bluffs the next Saturday night, and suggesting that appellant meet him Sunday to go over the matters. October 18th, appellant answered by letter and wire that he would be unable to meet Crandall as suggested, but in the letter stated that he would be glad to meet him at any time in Council Bluffs or Omaha, and that he would be pleased to be of service in helping dispose of the California land; he again asked for a detailed description of the automobile. October 22nd, Crandall wrote appellant a second letter, again referring to the land and requesting appellant to meet him in Omaha to discuss the matter. On the same date, Crandall also wrote appellant a letter giving a description of the automobile and stating that he would sell the same, fully equipped, for \$1,275.00, adding that he (Crandall) would drive the car to Omaha and turn it over to appellant if appellant would meet him the following Sunday. On the same day, Swenson wired Crandall, addressed to Spencer, Iowa, that he would pay \$1,200.00 for the automobile if

Crandall would drive the car to Omaha. October 25th, Crandall wired Swenson that he would meet him at the Hinshaw Hotel in Omaha Sunday morning. On Sunday, October 27th, appellant went to Omaha and met Crandall and Heald pursuant to the arrangement, and he says that he expected to receive the automobile at Omaha and surrender the \$1,200 note; he testifies by affidavit that at this time Crandall stated that he had decided definitely to sell the car for \$1,200.00 and take the note. Crandall did not take the car to Omaha, and appellant says that Crandall requested appellant to go to Spencer and get the car. Appellant says that Heald and Crandall stated to him that they had started with it from Spencer, but were compelled to turn back and go by rail because it was windy and appellant's eyes were weak. Crandall and Heald qualify this statement somewhat and deny that they said they had started with the car, but Crandall says that he did not drive the car because it was a big undertaking for him on account of his eyes and the wind, and further, that he did not feel justified in driving it so far, not knowing whether he could make the deal for the car. As to this matter there is a flat contradiction, by both Crandall and Heald, of appellant's affidavit, that they had agreed to exchange the car at \$1,200.00 for the note. Their testimony is to the effect that Crandall wanted \$1,275.00 for the car and that he never told appellant that he had decided definitely to sell the car for \$1,200.00; that Crandall told Swenson that he could go to Spencer and look at it, and Crandall would arrange with Heald to turn the car over at any price that Swenson and Heald might agree upon; that Crandall told Swenson that he was going to California the next day and that Mr. Heald was going back to Spencer that night and asked him to go back with Heald, but that Swenson said he could not go to Spencer before the next morning; that he told Swenson that any deal he made with Heald would be satisfactory, and that Swenson said he would go up and look at the car. He says that, as he understood it, the train that Swenson would

leave on the next morning would leave Omaha at 7:45. Appellant states that he told Crandall on the 27th that he would leave for Spencer on an afternoon train the next day, but that in fact he did start from Omaha at 10:55 the next morning; that he arrived in Spencer about 8:00 o'clock P. M., October 28th, and says he immediately telephoned to Heald that he had arrived, and requested Heald to come down to the garage and instruct those in possession of the automobile to deliver the same and that the note would be delivered to Heald; that Heald replied it was too late to close the deal that night and stated that he would come down in the morning; that about thirty minutes after this conversation the notice was served upon appellant. The car was not delivered. Appellant says that his purpose in going to Spencer was to exchange the note for the automobile; that he had no other business to transact at Spencer or anywhere in the state; that he would not have gone to Spencer or into the state except for the misrepresentations and deceit. He says that since said time he has learned that for some time prior thereto Crandall and Heald had been making inquiries and investigations in regard to the transfer of the notes to him and that the friendly attitude towards him assumed by them was feigned and for the purpose of deceiving him and procuring his presence within the jurisdiction.

An important feature of the case is a conversation had between Heald and defendant, George Gillespie, at Omaha on the morning of October 28th, shown by the affidavit and examination of Crandall, and there is no dispute in the testimony either as to the conversation itself having taken place or as to what Gillespie told Crandall, so that this must be taken as true. As to this matter, Mr. Crandall says that he was then on his way to California and had purchased his ticket; that on the morning of the 28th he interviewed Gillespie in Omaha and questioned him regarding the trip of Mr. Swenson and Mr. Johnson to Spencer, Iowa, at the time of procuring the notes in controversy, and that Gillespie told

him that he (Gillespie) was at Spencer at the time Mr. Swenson and Mr. Johnson, who is Swenson's attorney, were at Spencer; that Mr. Johnson went to Spencer with Mr. Swenson as Swenson's attorney, and that the purpose of the trip was to get the notes from him (Crandall) in exchange for the note of \$8,700.00 which Barber and Crandall had given Swenson some time before; that Gillespie also told Crandall that the purpose of getting the new notes for the larger note was to get one for \$2,500.00 for him (Gillespie), which amount Trowbridge was owing him and which should be turned over in payment of the debt; that Gillespie also told him that Swenson had not advanced any money on account of the \$8,700.00 note, or on the notes in controversy, to Trowbridge; that both Johnson and Swenson while at Spencer appeared to be very uneasy and when they left town with their automobile they picked him (Gillespie) up at the hotel and, instead of going down the main street, they went out of town on a back street; that when he was informed of these matters by Swenson he came to the conclusion that they had been guilty of dishonesty in procuring the notes, as Swenson had told him at the time the notes in controversy were given that he had advanced the money on the \$8,700.00 note and turned the same in at Trowbridge's office in Omaha. He says that when informed of these matters by Gillespie, he concluded that neither Swenson nor Johnson were acting honestly in the matter and that the transfer of the notes was for the purpose of putting Swenson and Gillespie in the position of innocent purchasers of negotiable paper. He also says that Gillespie told him that he would help him and would state all the facts.

It appears in the record that Gillespie had negotiated the \$2,500.00 note to the defendant Savings Bank about September 10, 1912. This note had been indorsed by Trowbridge to Swenson, and by Swenson to Gillespie.

Crandall also states that after the conversation with Gillespie he concluded for the first time to bring suit against Swenson to recover the notes; that he went to the telegraph

office at about 9:35 o'clock in the morning, which was soon after the conversation with Gillespie, and telegraphed Mr. Heald as follows: "Auto deal off—Don't deliver car—Starting suit to recover notes." He also telegraphed to F. F. Faville to start suit against Swenson to recover notes and see Heald; that at 9:45 that morning he took the train for California. He says that he did not have time to look Swenson up after the conversation with Gillespie, and that he supposed Swenson had already started for Spencer.

These are the main facts. There may be some others which will be referred to later. We are satisfied from the record that up to the time of the conversation between Crandall and Gillespie there was no bad faith on the part of plaintiffs or their attorney in the negotiations with Swenson; neither was there any bad faith after that time. Crandall testifies that up to that time, and at the time of the conversation with Swenson on the 27th of October, he fully intended to let Swenson have the car, the price to be agreed upon between Swenson and Heald. The \$1,200.00 note did not become due until December 26, 1912, and it is argued by appellant that the negotiation in regard to trading the automobile for the note not yet due was unusual, but the evidence shows that Crandall had ordered an automobile some time before and was having trouble to get it; that both plaintiffs were hard pressed for funds and their credit had become impaired because of the California deal and they were anxious to turn the automobile on the note; Swenson lived in another state, and it would take some time for the parties to make the turn.

It is argued by appellant that the plaintiffs and their attorney, Heald, assumed a friendly attitude towards Swenson for the purpose of misleading him. The record shows that, while plaintiffs believed that Swenson was concerned in the fraud, they had no proof of that fact up to the time of the conversation with Gillespie. As some of the witnesses put it, they concluded that Swenson, Trowbridge and Gillespie would all stand together.

Appellees admit that they were investigating the matter and that they went to Swenson and his attorney; that they questioned Swenson at different times about there being anything crooked in connection with his holding the note, and that Swenson admitted that it was a crooked transaction, but as the witnesses put it, he did not admit that he was crooked about it. Swenson was assuring them all the time that he had been acting in good faith and was an innocent purchaser of the notes. There was nothing underhanded or concealed about what plaintiffs did. They went directly to Swenson's attorney, Johnson, and told him that a fraud had been perpetrated upon them and inquired of him regarding Swenson's knowledge of Trowbridge's failure to send the money, and as to whether Swenson had paid any money to Trowbridge. Johnson himself says in his affidavit that Crandall and Heald stated to him that they were out investigating the whole transaction and asked for the address of Swenson, which Johnson gave them. Both Swenson and Johnson led plaintiffs to believe that Swenson was an innocent purchaser and had gotten the notes from Trowbridge for a large sum of money he had loaned him previous thereto.

It is urged by appellees that when Crandall had the conversation with Gillespie on the morning of October 28th, this was the first time they had any tangible proof to substantiate their suspicions of Swenson's participation in the fraudulent transaction of the notes. Swenson and Johnson both filed their affidavits on this hearing, but neither of them deny Gillespie's statement to Crandall that they acted as Gillespie described while in Spencer. The matters referred to by Gillespie have a bearing on the question as to whether Swenson was an innocent holder of the \$1,200.00 note and as to whether he participated in the fraud alleged to have been perpetrated upon plaintiffs by Trowbridge and Gillespie.

Counsel for appellant place stress on the fact that some of the earlier letters from Crandall to Swenson suggest that Swenson assist them in disposing of the California land, but

this was after Swenson and Johnson had assured Crandall of Swenson's entire innocence in connection with the alleged fraud. Plaintiffs had become considerably involved by attempting to handle the California land. Swenson was, it appears, a person who was loaning money and was engaged in such transactions, and he was perfectly willing to assist them. Plaintiffs seem to have believed that if they could handle the California land and secure the title they could save the land and their loss would be less and they could make a profit on the land. It is contended by the appellant that plaintiffs and Heald had been scheming for some three weeks to induce him to go to Spencer, but there is nothing in the record anywhere that plaintiffs or their attorney at any time made a suggestion even that appellant go to Iowa until the evening of October 27th. As already stated, the evidence of Crandall and Heald is, that the parties had not agreed upon the price of the automobile. Crandall was then on his way to California, and, if they had not agreed upon the price, there was nothing Crandall could do except to leave the matter of price for further negotiations between Swenson and Heald. Crandall says that at that time he fully intended to deliver the machine to Swenson when the price should be agreed upon. Appellant's theory is, that the sole purpose of his going to Spencer was to get the car and surrender the note; that the terms had already been agreed upon, and the only thing to do was to make the exchange. If this be true, there was no necessity for Swenson going to Spencer. He could have sent someone else for the car, or he could have had the car shipped to him, or Swenson could have refused to deal for the car unless it was brought to Omaha, so that in this way appellant could have frustrated any such scheme by any of the methods just suggested.

Other circumstances are referred to in argument at considerable length, but the opinion is already too long, and we shall not pursue the subject further. Our conclusion is that it has not been shown that appellant was fraudulently induced

to come into the jurisdiction, but that his appearance in Iowa was voluntary. The trial court so held, and the ruling is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS, WEAVER and LADD, JJ., concur.

MILLER WATT & Co., Appellee, v. LU B. MERCER, Appellant.

HUSBAND AND WIFE: Wrongful Possession of Property—Implied

- 1 **Promise to Return—One Purchasing Claims Against Other.** If the husband secures or takes possession of his wife's property without her knowledge or consent, the law raises the same implied promise to repay to her as it would were she a stranger to him. A wife may take and enforce a claim against her husband the same as she may against a stranger.

HUSBAND AND WIFE: Payments by One to Other—Good Faith.

- 2 A wife holding valid, enforceable claims against her husband may take the same good-faith steps to secure payment that she could take were he a stranger.

HUSBAND AND WIFE: Property of Wife—Husband's Dominion

- 3 **Over—Estoppel.** No estoppel can arise against a wife who has permitted her husband to exercise unrestrained dominion over her property when no creditor of the husband has relied thereon or been injured thereby.

PRINCIPLE APPLIED: Action by a creditor to enforce his claim against a wife's property. The husband had no property of material value, but from time to time, the wife received from relatives \$23,000 in money and about \$3,400 in bank stock, which stock always stood in her name. She allowed her husband to use her money without restraint. It was generally known that he was handling her money. Failure attended all his ventures. By 1906, he had ten shares of bank stock in his own name and about \$1,000 in real estate, and the wife had her said bank stock—all else had vanished. The wife's father had died and the wife had taken as part of her share of the estate an unpaid note for \$1,864 given to her father by her husband. About this time, the husband secured employment with a foreign mercantile house. The husband made no representations as to the financial condition of himself or wife, except he may have said that he was worth \$10,000. The company in making the contract really relied on the statement of a banker that the husband "had a good business

record, was responsible for his contracts, and was a stockholder in the bank," which latter statement was true. During this employment the husband contracted the debt sought to be enforced in the instant case. Some two years afterwards, the husband sold his own bank stock in order to pay his debts. He also, without the knowledge of the wife, sold her bank stock for \$3,600 and entered upon another business venture. His health soon failed; he sold out and realized about \$3,000, which he turned over to his wife to apply on her claim, she learning for the first time that he had sold her bank stock, and having no knowledge that he was owing plaintiff or any other creditor. *Held*, (1) that the wife in any view of the matter was a bona fide creditor of her husband to the extent of \$5,400; (2) she had a right in good faith to take the \$3,000 and apply on her claim; (3) she was not estopped to set up her claim against her husband's creditors.

Appeal from Washington District Court.—HON. K. E. WILLCOCKSON, Judge.

TUESDAY, JANUARY 10, 1915.

REHEARING DENIED FRIDAY, MAY 7, 1915.

The opinion states the case.—*Reversed*.

Brookhart Brothers and *Eicher & Livingston*, for appellant.

Edmund D. Morrison and *George F. Morrison*, for appellee.

WEAVER, J.—The defendant is the widow of Charles E. Mercer, deceased. The plaintiff was a creditor of Mercer in his lifetime, and after his death filed and secured an allowance of a claim against his estate in the sum of \$526.09. There being found no available assets with which to pay the claim, plaintiff brought this action in equity against the widow. The petition states in substance that, in the year 1906, Mercer applied to the plaintiff for employment as a traveling salesman, representing himself to be the owner of bank stock and other property real and personal and to be financially responsible for his contracts, and plaintiff, relying upon said repre-

sentations, gave the said Mercer employment and advanced to him the sum of \$526.09 in excess of his earnings, and that no part of said remainder has ever been paid. It is further alleged that Mercer died intestate in the year 1909 and his wife, the defendant, was duly appointed and qualified as administratrix of his estate, and that thereafter, plaintiff's said claim was duly filed and allowed. It is further alleged that the administratrix filed no inventory of the property of the estate but filed a report stating that the deceased left no estate or property to be administered upon. Plaintiff also avers that, when Mercer made the alleged representations as to his financial conditions, he was in fact the owner of bank stock in value greater than the claim in question, as well as real estate of considerable value; that thereafter, said Mercer sold the stock and invested the proceeds in a furnishing store and stock of goods at Oskaloosa, Iowa; that a one-half interest in said stock was converted by him into money shortly before his death and that he then either fraudulently or voluntarily gave the same, together with all the other money and property, to his wife, who has in fraud converted it to her own use, leaving no property or assets in the estate from which plaintiff's claim can be made. Upon these allegations, a decree is asked, requiring defendant to account for the property received by her from her husband, and that the same be ordered subjected to the payment of plaintiff's claim.

Defendant answers first in denial and further avers that the property of which it is alleged Charles E. Mercer was formerly owner was held by him in trust for the defendant, and that he was at no time the beneficial owner thereof. In reply, plaintiff pleads that defendant, by permitting her husband to hold himself out as the owner of the property and to obtain credit on faith thereof, is estopped to assert her alleged ownership as against plaintiff. By way of amendment to her answer, defendant pleads certain facts to the effect that deceased died indebted to her upon several items named, to an aggregate amount of many thousand dollars, and that upon

this indebtedness, the money and property received by her from him shortly before his death was applied as a partial payment.

Upon the trial of these issues, the court below found the equities to be with the plaintiff and entered judgment against the defendant requiring her to pay to plaintiff the amount of its claim allowed against the estate of her deceased husband, with interest and costs. It is from such decree this appeal has been taken.

The evidence shows the following facts, most of them without substantial contradiction. At the time of the marriage of Charles E. Mercer and the defendant, he had property or money to the amount of about \$500. Defendant had then little or nothing in her own right, but belonged to a family of some considerable financial means. During her married life, defendant received at various times, from her father, mother and uncle, money and property to an aggregate amount of at least \$23,000. Included in this sum, were fifteen shares of bank stock worth somewhere from \$230 to \$250 per share. She is a woman of no business experience and appears to have a very inadequate and confused idea of business affairs. She says she gave her property little attention and allowed her husband to manage it for her. He was for some years engaged with defendant's brother in general merchandising. This business had been closed out or sold before the transactions involved in this suit. The money he put into that business was doubtless taken from the funds received from his wife. Just how much this was does not appear, but when the business was settled and the debts paid, but a comparatively small amount remained, and this was in a piece of real estate in Davenport. Later, in March, 1906, Mercer had some negotiation with plaintiff, a wholesale mercantile corporation in Chicago, Illinois, to secure employment as a traveling salesman. At this time, he owned and held in his own name ten shares in the Washington, Iowa, National Bank, worth perhaps \$2,500. He also held title to a half interest in

the Davenport property, in which, after satisfying the debts of the old partnership, his margin of value was not to exceed \$1,000. The bank stock which had been received by his wife still stood in her name, but the dividends from year to year were doubtless collected or ultimately received by him. It should also be said that, in the settlement of her father's estate, defendant accepted as a part of her distributive share the promissory note of her husband given to her father in his lifetime for the principal sum of \$1,864.00, which was still unpaid at Mercer's death. If at this date in 1906 he had remaining any of the property received from his wife, except as above stated, the evidence does not reveal it, and for the purposes of this case it may be assumed that it had been absorbed or lost in his unprofitable ventures.

Such was the situation when Mercer applied to the plaintiff, or its predecessor, for employment. The circumstances attending that employment, as claimed by plaintiff, are to be found in the testimony of one Miller, the agent or manager with whom the matter was arranged. He produced a letter written by Mercer asking for employment and specifying the terms which he thought ought to be embodied in the contract. In this application he makes no reference to his financial ability, except as follows:

"I'm sending you letter from Cashier, F. H. Smith, showing that I am responsible for contracts I make, all of which I very respectfully submit for quick action."

The letter from Smith, who at that time was assistant cashier of the Washington National Bank, is as follows:

"John G. Miller & Co.,
Chicago, Illinois.

"Gentlemen:—I have known Mr. C. E. Mercer for years, he is a stock holder in this Bank, has a good business record and is responsible for any contracts he makes.

Yours truly,

F. H. SMITH, A. Cashier."

Thereafter plaintiff and Mercer entered into a written contract whereby he was to serve plaintiff as salesman for one year from April 1, 1906, on terms designated therein.

While employed under this contract, plaintiff alleges that it advanced money to Mercer in excess of his salary to the amount of the claim allowed in its favor against his estate. In addition to the production of the foregoing documents, Miller testifies that he acted for his company in employing Mercer and that, in a personal interview with him, Mercer told him he was worth \$10,000 and was a stockholder in the Washington National Bank. From this point, his examination, question and answer, proceeds as follows:

Q. "You may state whether or not in the making of the contract Ex. 8, you relied upon the statement of P. Ex. 2, and the fact that Mr. Mercer was a stockholder in the Washington National Bank in extending to him the credit, or making the payments to him which are the subject matter of this action?" (Ex. 2 here referred to is Smith's letter.)

A. "I did."

Q. "You may state what if any statement Mr. Mercer made to you regarding the amount of his holdings of Washington National Bank stock, to the best of your recollection?"

A. "I can't remember exactly, but it was not a large amount. Something like either three or five shares, something like that. Five I think it was, I am not sure. It has been some time ago."

Q. "You may state whether or not in the absence of knowledge of the ownership of the five shares of stock in the Washington National Bank, you would have entered into the contract P. Ex. 8 you have heretofore identified?"

A. "We would not."

Q. "When you say 'we would not,' do you mean John G. Miller & Co. would not have entered into such contract?"

A. "I do."

The foregoing is the sum total of all the evidence offered

or relied upon by the plaintiff as to what induced the witness and the company he represented to enter into the contract with Mercer or to extend him credit.

It further appears that, in 1908, and after the account or claim due plaintiff had accrued, Mercer arranged to go into partnership with one Dede to carry on a clothing business at Oskaloosa. About this time, he sold the ten shares of bank stock owned by himself, the proceeds of which, or the principal part thereof, were used to pay a debt which he owed to the bank. At the same time, he also sold his wife's shares of bank stock for about \$3,600 and of the proceeds put about \$1,300 into the business at Oskaloosa. What became of the rest of the money so received is not clearly shown, but it is quite certain none of it was paid over to defendant, unless it be in the final transaction, of which we shall later speak. The widow swears, and there seems to be nothing in the record contradicting her, that the sale of her stock and the use made by Mercer of the money so received were wholly without her knowledge or consent, and the fact did not come to her knowledge until very shortly before Mercer's death.

Not long after entering upon the Oskaloosa venture, Mercer's health began to fail, and he died on June 2, 1909. Shortly before his death, he sold his interest in the clothing business to his partner. The amount received upon this sale does not clearly appear, but we infer it was substantially the sum deceased had invested therein. Thereafter, and in evident view of his early decease, he expressed his desire to turn over to his wife all the property in his possession, saying it all belonged to her and he could die easier if he knew she had what she was entitled to. At that time, he had one or more bank certificates of deposit of a total value of not to exceed \$2,500, and about the same time, a further sum of \$563.09 was received from the sale of the Davenport property. He called in a friend and with his advice and assistance endorsed and delivered the certificates to his wife and paid or caused to be paid to her the cash item last above mentioned.

This seems to have included all in the way of property or estate which he then had, belonging either to himself or his wife, except a small cash balance of about \$42 at the bank.

It should be said that, when not in business for himself, deceased was usually employed at a salary of \$50 to \$75 per month, but there is nothing in the record to indicate that he had made any accumulation from that source or indeed from any other source, unless it be the ten shares of bank stock which he held in his own name for some years and finally sold in November, 1908. He put no capital of his own into the mercantile business which he carried on in partnership with his brother-in-law, a business which seems to have resulted in no profit except, perhaps, the margin of \$563.09 already mentioned. He put nothing into the Oskaloosa business except the \$1,300 paid from the proceeds from his wife's bank stock. No other venture or investment of importance by him is shown and no other source of income or profit except the money and property he had received belonging to his wife. He took no pains to conceal the fact that he was dealing with her money, and it was commonly and well known by the banks and others with whom he dealt that such was the case. He was regarded, however, as a man of integrity, was active and industrious and enjoyed a fair degree of credit. That he dealt with her money and property as freely and unreservedly as if it were his own (except the one item hereinafter mentioned) is clear. She says she gave it into his hands to manage for her, and the evidence shows she permitted him to do so without restraint. He was evidently not a practical success as a business man and the funds he received from his wife gradually dwindled away until, at the time of the transactions immediately preceding his death, the remnant in his hands was little, if any, in excess of \$3,000. The one item mentioned which he did not for a considerable period convert or deal with as his own individual property was the bank stock which the defendant had received from her parents. This stood and remained in her name at all times up

to November, 1908, when he sold it, though, as we have said, it is probable he collected the dividends accruing thereon. Defendant testifies, and there is nothing in the record to discredit her statement, that at the time she received the transfer of the property from her husband, she had no knowledge or notice that he owed anything to plaintiff or that any such claim was outstanding. Nor is there any showing that he was otherwise indebted or financially embarrassed. It was at this time also she first learned of the sale by him of her bank stock. Defendant, having qualified as administratrix, filed an inventory of the estate, showing only exempt property and the cash item of \$42 above mentioned. She paid the cost of her husband's sickness and burial, amounting to several hundred dollars.

The question now arises whether, upon this practically undisputed showing, the plaintiff has the right, legal or equitable, to compel the defendant to account for the moneys and credits received from her husband before his death, and apply them to the payment of its claim.

1. HUSBAND AND WIFE: wrongful possession of property: implied promise to return: one purchasing claims against other.

At the threshold of this inquiry, we have to determine whether defendant was a bona fide creditor of her husband to the extent of the value of the property received from him. Of this there is no room for doubt. Even if, for the purposes of this case, it be conceded that as to all other items of her property there was no contract relation with her husband and no contract obligation on his part which the law would enforce in her favor, this is certainly not the case concerning the promissory note of \$1,864 and interest which she received from her father's estate, or the item of bank stock to the amount of \$3,600, which he sold and disposed of without her knowledge or consent. The first was an express contract to pay, which was as valid and enforceable in her favor as it was in favor of the payee; and as to the second item, the law implies a promise to pay the value of the stock converted by him to the same extent

as if the parties were not husband and wife. *Dunham v. Bentley*, 103 Iowa 136; Code Sec. 3155.

These items alone, exclusive of interest, constituted an indebtedness in her favor of \$5,404. The fact that she allowed her husband to handle and invest and use as his own all the remainder of her property affords no presumption nor is it proof that she forgave the debt evidenced by the note or that she had given or surrendered to him the title to the bank stock. Her position as creditor of her husband, at least to the extent indicated, is, therefore, impregnable. As such, she had the same right as any other creditor to accept payment or security from him, even though it absorbed his whole estate and operated to prevent collection of other valid existing claims. *Muir v. Miller*, 103 Iowa 127. This is, of course, subject to the elementary principle that the transfer must be made or security given in good faith, and not as part of a fraudulent scheme to defeat, hinder or delay creditors. There is no evidence whatever in this case that defendant received the property in question with any fraudulent purpose. On the contrary, her good faith is clearly and affirmatively proven. The amount received by her was much less than was justly due her from the deceased and the transaction by which she received it cannot be impeached on the ground that she was not a creditor or that she received it in bad faith, in the absence of some testimony fairly tending to prove that fact.

We have then further to consider whether defendant can be held in any manner estopped to assert her claim or title against the plaintiff. In support of its demand in this respect, plaintiff relies upon the proposition that, where a wife permits her husband to use and deal with her property as his own, in such manner or under such circumstances as to justify creditors in believing that the property belongs to him in his own right (no evidence appearing that he is acting merely as an agent or trustee), and thereby and upon strength

2. HUSBAND AND WIFE: payments by one to other: good faith.

3. HUSBAND AND WIFE: property of wife: husband's dominion over: estoppel.

of his apparent ownership credit is extended to him in good faith, she will be estopped to assert her title against the collection of debts so contracted by him. This rule is a familiar one which the courts do not hesitate to apply when the facts justify it; but we are quite clear that, giving plaintiff the full benefit of the most favorable construction which can be placed on the testimony, there is here no case for its application. Counsel for appellee, recognizing the limitation of the rule, concede in argument that, before an estoppel can be found, it must appear that the credit was extended on faith of the ownership of the property being in the husband, and if the creditor did not rely upon the fact of the title being in the husband and was not misled by such apparent ownership, the wife may assert her rights in the premises. *Devore v. Jones*, 82 Iowa 66.

Now what does the record show the plaintiff to have relied upon in extending credit to Mercer? Counsel for appellee argue the case as if defendant had allowed her husband to take and use her property as his own, and in such manner that plaintiff was justifiably misled into believing him the true owner and, on the strength of such apparent ownership, it was induced to extend him credit. The record wholly fails to make any such case. Plaintiff was doing business in Chicago and Mercer was living at Washington, Iowa. So far as appears, plaintiff knew nothing and had no information as to what property Mercer had in his possession or control, or what, if any, property there might be over which he was exercising dominion or acts of ownership, save only the statement of Mercer himself that he had four or five shares of stock in the Washington National Bank, and the general statement in the letter written by Smith that Mercer was a stockholder in the bank. Mr. Miller, the man who acted for the plaintiff, simply says that he relied upon the letter of Smith "and the fact that Mercer was a stockholder in the Washington National Bank in extending him the credit and making the payments to him which are the subject-matter of this action." He then

adds that Mercer told him he owned "three or five shares or something like that, think it was five," and that "in the absence of the ownership of the five shares of bank stock the plaintiff would not have entered into the contract." It appears without dispute that Mercer was then in fact the owner of *ten* shares of the stock and continued in the ownership thereof for two and a half years after that date. There is no statement or intimation that Miller made any further inquiries or was told of any other item or description of property which Mercer owned or claimed to own. Smith's letter makes no suggestion concerning Mercer's property except to say, "he is a stockholder in this bank," which in truth he was, and to say in general terms "he is responsible for any contracts he makes." Smith did not testify in the case and the court cannot say that he was deceived or misled by any apparent ownership by Mercer of the property of the defendant. Indeed, it is affirmatively shown that neither the bank for which Smith wrote nor Smith himself labored under any delusion as to the real ownership of the property in Mercer's hands. The defendant is not chargeable with any responsibility for the representation made by Smith nor for the reliance placed thereon by the plaintiff. Mercer is not shown to have made any representation or claim of ownership in the bank shares owned by his wife. They stood in her individual name and the record is wholly barren of any evidence that plaintiff believed or had any reason to believe that Mercer owned them or had any claim upon them, or indeed that it knew of their existence until after Mercer's death. In short, there is no evidence upon which any theory of estoppel can be properly grounded. As we have seen, plaintiff's only claim in evidence is that it extended credit upon faith of Mercer's ownership of five shares of stock and Smith's statement that Mercer was good for his contracts. Mercer was then in truth the owner not only of five but ten shares; Smith did not speak nor did he profess to speak for Mercer's wife, nor did he undertake to inform plaintiff what property Mercer owned or pre-

tended to own. Mercer, being justly indebted to his wife, had the right to prefer her before his other creditors. Until such preference was effected, the wife and plaintiff stood in equal right to enforce collection of their respective demands, but it is not to the discredit of the memory of the deceased that when death knocked at his door he recognized the superior moral claims of the wife whose patrimony he had wasted and to the extent of his ability restored it to her hand.

The decree below must be reversed and plaintiff's bill ordered dismissed.—*Reversed.*

DEEMER, C. J., LADD, PRESTON and EVANS, JJ., concur.

MADELLA RYSTAD, Plaintiff, Appellant, v. BUENA VISTA
COUNTY DRAINAGE DISTRICT No. 12 et al., Appellees.

DRAINS: Assessments—Interest—From What Date Computed. As-

- 1 assessments, of benefits for drainage improvements draw interest from the date of the original assessment by the board of supervisors, whether the amount is fixed by the board of supervisors or by the court on appeal. (Sec. 1989-a12, Sup. Code, 1913.)

DRAINS: Assessments—When Delinquent—Penalties. Penalties for

- 2 the nonpayment of assessments of benefits for the construction of drainage improvements are held in abeyance, pending an unsuccessful appeal on behalf of the drainage district to the Supreme Court from an order of the district court reducing the assessment made by the board of supervisors. (Sec. 1989-a26, Sup. Code, 1913.)

TENDER: Insufficient in Amount—Relief on Appeal. While an in-

- 3 sufficient tender will not be excused simply because the adversary makes an illegal and excessive demand, yet in a proper case the judgment on appeal will be so modified as to preserve the rights of one making an insufficient tender.

PRINCIPLE APPLIED: The public authorities demanded certain sums as interest on taxes and certain sums as penalties. The demand for interest was legal; the demand for penalties was illegal. The taxpayer made an insufficient tender. The land was sold for taxes, interest and penalties. A demurrer to the petition

in equity to set aside the tax sale was properly sustained because of the insufficient tender. To affirm would leave the judgment of the lower court as an apparent adjudication. *Held*, the judgment would be so modified on appeal that it would not stand as an adjudication in bar, but in abatement only.

Appeal from Buena Vista District Court.—HON. D. F. COYLE, Judge.

SATURDAY, MAY 8, 1915.

SUIT in equity to set aside a tax sale and to enjoin a tax deed thereunder and for equitable relief. An equitable demurrer to the petition was sustained and the petition was accordingly dismissed. The plaintiff appeals.—*Modified and Affirmed.*

Guy Mack, County Attorney, and *James Deland*, for defendants, appellees.

Helsell & Helsell, for appellant.

EVANS, J.—It is made to appear from the petition that the plaintiff is and was the owner of a quarter section of land situated in a drainage district which was established on or about July 31, 1909. The board of supervisors ordered separate assessments against each 40-acre tract to a total amount of \$2,777.75. From these assessments, an appeal was prosecuted by the owner to the district court. The assessments by the board of supervisors upon the 40-acre tracts were, respectively, \$1,347.97, \$941.95, \$362.88, and \$124.95. The two tracts carrying the highest assessments are referred to in the record as the north forties. The case came to a hearing in the district court in June, 1910, and the following assessments were adjudged by the district court: \$950, \$625, \$362.88, and \$124.95. From such judgment of the district court, an appeal was prosecuted on behalf of the district to this court, where the judgment of the district court was later

1. DRAINS: assessments: interest: from what date computed.

affirmed. Immediately after the entry of judgment in the district court, the owner tendered full payment of the amount adjudged by the district court without interest, which tender was refused by the treasurer. The opinion of this court was filed October 25, 1912. On November 29th thereafter, a written tender of payment was served upon the treasurer, which will be hereafter referred to. This tender was refused, and in January following, the land was sold at tax sale for the amount of the assessments as fixed by the district court, with interest at 6% from the date of the original assessment by the board of supervisors, and penalties at 1% a month from March 1, 1910, a period of thirty-four months. The contention of the plaintiff is that he was liable only for the amount found by the district court and affirmed by this court, with 6% interest thereon from the date of affirmance herein, viz., October 25, 1912. The contention of the defendants is already indicated by the interest and penalties added for the tax sale as above stated. Before bringing his action, the plaintiff made a written tender in strict accord with his present contention.

I. Inasmuch as the facts pertaining to the north forties upon which the original assessment was reduced in the district court are in that respect different from the facts pertaining to the other 40-acre tracts, we will first consider the respective rights of the parties as to these north forties. A few provisions of the statute may be conveniently set forth here:

Code Supp. 1907, Sec. 1989-a12, among other things provides: "When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish, annul, or affirm the apportionment made in said report, or in any part thereof as may appear to the board to be just and equitable; . . . and when such hearing shall have been had, the board shall levy such apportionment so fixed by it upon the lands within such levy or drainage district; and all installments of the tax shall be levied at that

time and *shall bear interest at six per cent. per annum from that date.*"

Sec. 1989-a13 provides: "Said tax shall be levied upon the lands of the owners so benefited in the ratio aforesaid and collected in the same manner as other taxes for county purposes."

Sec. 1989-a26, among other things, provides: "But where no such terms and agreement in writing shall be made by the owner of any land, lot, or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable *with interest from the date of such assessment*, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes."

The first inquiry which naturally arises is whether the assessments fixed by the district court should bear interest from the date of the original assessment by the board of supervisors. It will be noted that the statute provides for interest from such date. This is a part of the provision for equality in the assessments. In the *Lightner* case, 156 Iowa 398, 406, we held that it was the duty of the district court to give effect to this provision. But in that case, the district court had refused to do so, and such fact appeared upon the record. Manifestly, the district court could give effect to this provision of the statute by making the assessment sufficiently large to include such an item, or by providing that the sum fixed should bear interest from the previous specified date. The real issue in litigation in the district court on appeal is, what amount should have been assessed by the board of supervisors against the land in question as its equitable share of the burden? Such amount being ascertained and declared, it ought to

bear interest from the original date precisely as it would have done if it had been made by the board in the first instance. Nothing less than this would preserve equity in the distribution of the burden. In construing the order of the court, therefore, on such appeal, we think that it ought to be construed *prima facie* as a declaration of the amount which ought to have been assessed originally. In such case, it should be deemed to draw interest from the original date as provided by the statute. On the other hand, if it should be made to appear that the item of interest from the original date had been considered by the court and either included or rejected, then such order would be necessarily conclusive until reversed on appeal. Such was the situation presented in the *Lightner* case, *supra*.

There is nothing in the present record to justify construing the order of the district court on appeal otherwise than as fixing the amount which should have been assessed against the land in question upon the original date. We think, therefore, that the provision of the statute would apply, and that it should be deemed to bear interest from such date.

II. On the question of penalties, a somewhat different situation is presented. If there had been no appeal from the order of the board of supervisors, no penalties could have attached before March 1, 1911. Under the statute above quoted, the tax did not mature or become due until March 1st following, and it would not become delinquent until the "first

2. DRAINS : as-
assessments :
when
delinquent :
penalties.

day of March next after its maturity." We reach the further conclusion that, upon the record in this case, the taxes did not become delinquent on March 1, 1911, and were therefore not subject to penalty at that time. The landowner exercised his statutory right of appeal from the assessment of the board of supervisors. The question thus presented was triable *de novo*. The right of appeal would be a barren right if, pending the appeal, penalties should be permitted to absorb the fruits of final success. The appeal is a part of the statutory method

provided for determining the amount of assessments which should be levied upon the land. Pending such determination, the tax cannot become delinquent in the sense that it is subject to penalty. The reasonableness of this result is manifested in this case by the fact that the landowner was successful on his appeal to the district court, and the public officers prosecuted the appeal from the district court to this court. The delay caused by the appeal of the landowner to the district court was comparatively brief. The delay of the subsequent appeal was considerable.

Appellee relies in argument on the following cases: *C. R. & M. R. R. Co. v. Carroll County*, 41 Iowa 153-192; *Litchfield v. Hamilton County*, 40 Iowa 66; *Tobin v. Hartshorn*, 69 Iowa 648-653.

It is enough to say that the plaintiff in each of the cited cases attacked by injunction the validity of the tax as a whole and was defeated. He was not availing himself of any statutory right of appeal for the purpose of determining the true amount which should be levied against him. We think it clear that the cited cases do not govern at all the present case.

III. In the *Lightner* case, the district court fixed the date at which the taxes assessed should become delinquent. Upon appeal to this court, a new date was fixed for such delinquency. We think this is the correct course to pursue in such cases. In brief, therefore, we hold:

(1) That the amount of benefits as finally assessed against a landowner should, as a matter of equality between the various taxpayers, bear interest from the date of the original assessment by the board of supervisors;

(2) That on the question of penalties, the plaintiff should not be deemed to have become delinquent, pending the appeal of his opponents to this court.

The conclusion thus reached is determinative also of the same questions arising as to the other tracts of land upon which the original assessment was not disturbed.

IV. On November 29, 1912, the plaintiff served upon the county treasurer the following written tender:

"You will please take notice that Madella Rystad, widow of A. R. A. Rystad, and the present owner of the South West Quarter of Section 26 of Township No. 93, of Range No. 37, West of the 5th Principal Meridian, Buena Vista County, hereby tenders to you and offers to pay you by payment to the County Treasurer of Buena Vista County, Iowa, the sum of \$2,062.83 as drainage tax in Drainage District No. 12 in Buena Vista County, Iowa, and being the amount determined upon in the appealed case on such drainage tax by the Supreme Court of Iowa, October 25th, 1912. Said opinion being in affirmance of the decision of the district court of Buena Vista County, Iowa, together with 6% interest on said sum from said date, October 25th, 1912, to the date of this tender, in full payment for the drainage tax legally assessed in said district."

3. TENDER: insufficient in amount: relief on appeal.

Upon this tender the present petition rests. The petition does not offer to do more than to pay \$2,062.83 with interest from October 25, 1912. The amount thus tendered was not and is not enough. The sum of the situation is, then, that the demand for penalties was illegal. The demand for interest from July, 1909, was legal. There was legally due from the plaintiff the sum adjudged by the district court, with interest from the date of original assessment. The illegal demand for penalty and the wrongful sale for taxes not delinquent would not justify the plaintiff in tendering less than was due. The burden was and is upon the plaintiff to tender equity. She has not done so. Though we find, as a matter of law, that she is now and hereafter entitled to redeem from the tax sale without penalty or other interest than herein indicated, this entitles her to no relief under her petition. Because of her insufficient tender, the demurrer to her petition was properly sustained.

The ruling of the court, however, did not indicate the

ground thereof, nor did the judgment of dismissal. On the face of it, it might be hereafter pleaded as an adjudication in bar against any further relief to the plaintiff even as against the illegal penalties exacted; whereas we sustain it on the one ground herein indicated and as a judgment in abatement and not in bar. The appellees have contended here for the right to penalties, and their argument has sustained the judgment below on that ground. The judgment below will, therefore, be modified to the extent herein indicated, and will be made to rest upon the specific ground herein stated, without prejudice to the right of plaintiff hereafter to tender and make redemption without penalties from the tax sales in question, and to enforce such right by another action.

In view of the state of the record and the result here, the costs of this appeal will be apportioned one-half to each party. This apportionment does not affect the taxation of costs in the lower court.—*Modified and Affirmed.*

DEEMER, C. J., SALINGER and PRESTON, JJ., concur.

STATE OF IOWA, Appellee, v. L. C. WARD, Appellant.

GAME: Deer—Prohibition on Killing—Constitutional Right to Protect Property. An owner of property may lawfully kill a deer if such killing was reasonably necessary in order to prevent substantial injury to the property of such owner, even though the statute (Sec. 2551-a, Sup. Code, 1913) prohibiting the killing of deer contains no such exception. The right to protect property is a constitutional right.

GAME: Deer—Title in State—Effect of Statute. The statute (Sec. 2562-b to 2562-d, inclusive, Sup. Code, 1913) declaring the title to all wild game to be in the state and providing that the killing of any deer shall be under the authority of the state fish and game warden does not render unlawful the killing of a deer in order to prevent substantial injury to property, even though the consent of such warden to such killing was not obtained, the title of the state to the carcass being fully recognized by the defendant.

Appeal from Pottawattamie District Court.—HON. E. B. WOODRUFF, Judge.

SATURDAY, MAY 8, 1915.

THE defendant was prosecuted under information charging him with unlawfully killing a deer. The defendant pleaded not guilty and a trial was had in justice court resulting in conviction. From this judgment, an appeal was taken by defendant to the district court. Upon trial had to the court without a jury, the defendant was again convicted and has appealed.—*Reversed.*

Turner & Cullison, for appellant.

George Cosson, Attorney General, and *Wiley S. Rankin*, Special Counsel, for appellee.

EVANS, J.—The record herein strongly suggests a purely moot case. As is usual in such a case, the arguments are more formal than zealous. There is much in the record to indicate that the alleged criminal act was committed for the very purpose of presenting a case and taking judicial opinion thereon. Needless to say, the courts are not friendly to moot cases. They are kept sufficiently busy with bona fide controversies. In view of the fact, however, that the defendant is under statutory punishment, we do not feel justified in wholly forsaking him at this stage of his experiment.

In the judgment of the district court was included the following finding:

“It appears that this case was brought as a test case to determine whether this defendant has a right to kill deer that are injuring and destroying his corn. It appears from the evidence that in the neighborhood of defendant’s farm there are from 150 to 200 deer which range up and down the country adjacent to defendant’s premises, and that for years they have eaten up and trampled down more or less of the defendant’s standing grain and his corn after it has been cut and shocked, even when piled up in his barn lots; that de-

1. GAME: deer:
prohibition on
killing: constitutional
right to protect
property.

fendant has many times driven them away, but they have come back and have destroyed his crops to the amount of hundreds of dollars, and at last he shot one, not for the purposes of food or out of wantonness, but to have the question determined by the highest judicial tribunal of this state whether he is obliged to submit to the continuation of such damage. It appears from his own testimony that he has never asked the game warden of this state to kill or capture any of such deer as provided in Chapter 206 of the Laws of the Thirty-fifth General Assembly. It is the opinion of the court that the defendant had no right to kill the deer in question before he had asked protection from the game warden as seems to be afforded by such statute. Therefore and also for the purpose of having the matter determined the defendant is found guilty . . .”

The defendant was prosecuted under Secs. 2551-a and 2551-b of the Code Supplement. Such sections are as follows:

“2551-a. That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law.

“2551-b. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period not exceeding thirty days or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment.”

It will be noted that the prohibition of this statute is absolute and unqualified in its terms. The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it in another way: Is it open to the defendant to justify an admitted killing by showing a reasonable necessity in defense of person or property?

The following, from the brief of counsel for the state, is

a sufficient indication of the circumstances of the killing complained of:

"This action is brought as a test case on stipulation as to facts in justice court. Defendant pleaded not guilty but admitted that he killed the deer. He alleged that the killing was done of necessity for the protection of his property.

"These deer, which are the property of the state, have selected the southwestern part of Iowa, particularly Pottawattamie County and vicinity, for their herding and living purposes for a number of years. There seems to be anywhere from 150 to 200 or more of them and they roam about at will. No ordinary lawful fence, such as the owners of property put up for their protection and the enclosure of their animals, is sufficient to keep this magnificent herd of deer off their farms. There is no question but that they go where they please and eat of such crops as they like. They will go up to an ordinary fence, and without any noticeable effort whatever, lift themselves gently and gracefully, and apparently glide over the highest fence and wander off into a field as if there had been no impediment whatever.

"Defendant, it seems, had driven off these animals several times but they came back into his yard and began eating fodder which had been stacked up near his place. The record shows conclusively that the deer which was killed by defendant attempted to harm no person; that it was simply eating of the fodder which is conceded to have been the property of defendant. Defendant claims that he was acting in his own right to protect his property and to keep the deer from injuring and destroying it."

It will be noted that the deer was killed not only while upon the defendant's premises but while he was actually engaged in the destruction of the defendant's property. Giving the testimony the fullest credence, the deer was one of great voracity. He was capable of doing and was threatening to do great injury to defendant's property.

By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of person and property is a constitutional right (Art. 1, Sec. 1, Constitution of Iowa), and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing. *Aldrich v. Wright*, 53 N. H. 398, 16 Amer. Rep. 339.

We do not presume to pass upon the weight of the evidence tending to prove the fact of reasonable necessity. It is sufficient to say that the evidence would have sustained such a finding if made by the trial court. The case was tried below on the theory that such defense was not available.

It will be noted that the act of killing, as contended by defendant, was wholly defensive and preventive. Whether a deer may be lawfully killed today by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought or threatened by other deer, are questions not involved herein, and we do not purport to pass on them.

II. The conclusion of the trial court was based in part upon the provisions of Chapter 206, 35 G. A. If there was in fact any violation of such statute by the defendant, it was not charged in the information. Furthermore,

2. GAME: deer: title in state: effect of statute: we see nothing in such statute which interposes any obstacle in the way of defendant's justification. Such statute is amendatory to Chapter 118, 34 G. A. Such Chapter 118, 34 G. A., as amended by Chapter 206, 35 G. A., is as follows:

"Sec. 1. The ownership and title of all wild game, animals, and birds, found in the state of Iowa, except deer in

parks and public and private preserves the ownership of which has been acquired prior to taking effect of this act and all fish in any of the public waters of the state, including all ponds, sloughs, bayous or other waters adjacent to any public waters, which ponds, sloughs, bayous, and other waters are stocked with fish by overflow of public waters, is hereby declared to be in the state, and no wild game, animals, birds, or fish shall be taken, killed, or caught in any manner at any time or had in possession, except the person so catching, taking, killing or having in possession, shall consent that the title to said wild game, animals, birds, or fish, shall be and remain in the state of Iowa for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, or killing.

"Sec. 2. The catching, taking, killing, or having in possession, wild game, animals, birds, or fish at any time, or in any manner, or by any person, except as provided in section one hereof shall be deemed a consent of said person that the title of the state shall be and remain in the state for said purpose of regulating the use and disposition of the same and said possession shall be consent to such title in the state.

"Sec. 3. When it shall become necessary in the opinion of the state game warden or his deputies to kill or capture any deer now running at large within this state, it shall be done under the authority and direction of the state fish and game warden, who shall distribute such deer so killed or captured within this state and the expense of said killing or capture and distribution shall be paid by the person receiving such deer."

The purpose of the foregoing was to establish title in the state to all wild game whether dead or alive. This title was fully recognized by the defendant at every step. No attempt was made by him to appropriate or conceal the carcass of the slain deer. On the contrary, he immediately notified the public authorities and tendered the carcass to the appropriate officer.

We think, therefore, that the defendant was entitled to make an issue of fact on the question of justification as already indicated. The judgment of conviction must therefore be—*Reversed*.

DEEMER, C. J., PRESTON and SALINGER, JJ., concur.

THE DES MOINES INDEPENDENT SCHOOL DISTRICT OF SALT CREEK TOWNSHIP, Appellant, v. J. MOSE McCLURE, Appellee.

ESTOPPEL: Sovereign State—Application of Doctrine Against—Facts Not Justifying—Grantee of State. Whether the doctrine of equitable estoppel, under any state of facts, may be applied against the sovereign state, *quaere*. Concededly, the statute of limitations does not run against the state. Evidence reviewed and *held*, neither the state nor its grantee was estopped to assert title against a public school corporation.

PRINCIPLE APPLIED: In 1881, a public school corporation received a quit-claim deed to a certain acre of land and, in *sole* reliance on the validity of the deed, built a schoolhouse and other improvements on the land, and for over thirty years used the same for school purposes without objection. In September, 1912, it was first learned that this deed was by an entire stranger to the title. The title to the entire forty-acre tract of which the one acre was a part was in truth in the state of Iowa from 1856 to September, 1912, on which latter date the state conveyed to the defendant in instant case. The defendant had lived for many years in the neighborhood and long before his purchase had full knowledge of the schoolhouse in question. For a portion of the time after the school corporation took its deed, public taxes were collected on the entire forty acres, later on only thirty-nine acres. One citizen of the county became secretary of state and another became auditor of state and later governor, all prior to September, 1912, and they, at all times, had full knowledge of the location of this schoolhouse. What knowledge was possessed by them of the condition of the title to the land in question during their terms as state officers was not shown. At no time did the school corporation act or rely on any silence on the part of the state or its officers. *Held*, the state was not estopped to insist on its title to the entire forty acres and that its grantee had the same right as the state.

Appeal from Davis District Court.—HON. FRANK W. EICHELBERGER, Judge.

MONDAY, MAY 10, 1915.

ACTION in equity to enjoin defendant from interfering with plaintiff's possession and use of one acre of land, and to establish plaintiff's title and rights thereto. By cross-petition, defendant claimed to be the owner of the land and asked that his title be quieted. There was a decree for defendant. Plaintiff appeals.—*Affirmed*.

C. W. Ramseyer, for appellant.

W. D. Davis, C. A. Robbins and Henry E. Sampson, for appellee.

PRESTON, J.—The petition alleges that plaintiff is a school corporation and as such it has owned for over thirty years the grounds located as follows: One acre square out of the southeast corner of the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 10, Tp. 70, R. 12, in Davis County, Iowa, and during all said time has maintained thereon a schoolhouse for the purpose of conducting a public school, and has erected and maintained other outbuildings, and has dug and maintained a well on said premises; that during all said time said Independent School District has, during each year, maintained a public school in said building, at public expense, and is now preparing to open the spring term of school; that on July 21, 1881, said premises were conveyed to plaintiff by deed duly recorded, and that plaintiff has been in possession and control of said premises from the date of the deed to the present time; that in March, 1913, defendant took possession of the premises and built a barbed wire fence in front and refused to permit the plaintiff to use the property for school purposes; that there are between twenty-five and thirty children of school age within the district who will be deprived of school privileges unless defendant is enjoined. Plaintiff asks an injunction, and that its rights and title to the one acre be established.

1. ESTOPPEL:
sovereign
state: appli-
cation of doc-
trine against:
facts not
justifying:
grantee of
state.

For answer, and by way of cross-petition, the defendant says that he denies that plaintiff ever owned the real estate in question; avers that he had served written notice on plaintiff to vacate the premises and demanded possession thereof; that the person conveying the real estate to plaintiff had no right, title or interest therein at the time of making said conveyance, or at any other time; that the one acre in question, with other lands, was by the government of the United States granted to the state of Iowa by acts of Congress approved in 1845 and 1852; that ever since said date the state of Iowa was the owner of said lands until on or about the 3rd of September, 1912, when the same was conveyed by the state of Iowa to this defendant by a patent; that no conveyance of said land of any kind, save and except the said patent to said defendant, was ever executed by the state of Iowa; that the patent aforesaid was recorded in Davis county, September 9, 1912. Defendant, therefore, alleges that he is the absolute and unqualified owner of the entire forty-acre tract, including the one acre in question, and that plaintiff has no right, title or interest therein or to any part thereof.

For reply, plaintiff denies that the state of Iowa was the owner of said land on September 3, 1912, or at any other time within the last thirty or forty years; alleges that plaintiff has been in open, notorious and hostile possession of the one acre described, under color of title and claim of right, for a period of more than thirty years against defendant and his prior grantors, and that defendant is now barred by the statute of limitations to claim any right to said land; that plaintiff has made valuable improvements thereon, has built a schoolhouse, outbuildings, wells, and other improvements, at public expense; that said improvements were made with the knowledge of defendant and his prior grantors during said period, and that because thereof defendant is barred and estopped from claiming any right or title thereto; denies that its occupation of the land has been wrongful.

Plaintiff filed three lengthy amendments to the reply,

pleading the several matters in different ways as constituting an estoppel against the state and its grantee, the defendant. In these amendments, it is alleged, substantially, that before plaintiff acquired the acre of ground on which its schoolhouse is now located, it for many years prior to that time owned another acre of ground on said forty-acre tract and maintained and conducted a public school thereon; that during all the time it so conducted and maintained a school, both before and after it acquired the acre of ground in controversy, it was an independent school corporation, and conducted under the laws of the state of Iowa as an independent school district, and received each year its portion of the state school fund to maintain and conduct said school as a public school. Plaintiff further states that, if the court should find that the legal title to said land was in the state up to and prior to September 3, 1912, the state and Davis County and the defendant, McClure, who claims to have received title to the same, are now each of them estopped from claiming title against the school district; that it conducted such school without objection from any public authorities; that, because of the facts alleged, the defendant and his prior grantors have waived all right and claim to said one-acre tract, and have waived all right and claim to object to plaintiff's use of said tract of land for school purposes; that they have been guilty of laches and are now barred and estopped from claiming any right in and to the one acre; that defendant, McClure, had knowledge of plaintiff's use of said property before he purchased the same and knew of the improvements thereon.

It is further stated that if the court should find that at the time of the issuance of the patent by the state to defendant the title was in the state, then the court should find that at the time plaintiff was the equitable owner of said premises, and that defendant purchased the same subject to plaintiff's right to use the property for school purposes; that even though the court should find the defendant to be the legal owner of the land, yet because of the facts alleged, the plain-

tiff should not be ousted from the premises, but defendant should be decreed to be the holder of the legal title to the ground for the benefit of and in trust for plaintiff. Plaintiff says that during all the time it occupied said premises it had no knowledge or information that the state claimed any right or title to the one acre of ground until the notices were served upon it by defendant, and that, because of said knowledge, defendant's acts constitute fraud against plaintiff, and because thereof defendant is not entitled to retain title to said ground as against the plaintiff; that for more than ten years prior to plaintiff's deed, the state, through its taxing officers, levied and collected taxes on the forty acres, which includes the one-acre tract, for the purpose of raising revenue to defray the expenses of both the state and Davis County, and that since said deed the state, through its taxing officials, has excepted the one acre in controversy in levying taxes on the forty-acre tract; that plaintiff has been an occupant and settler on the one acre of ground described.

Many of the facts are not disputed. It was conceded that the deed records in the recorder's office of Davis County show a certificate which was filed for record March 17, 1905, and the record was offered in evidence. This certificate is, in substance, as follows: The secretary of the state of Iowa certifies that under the act of Congress approved March 3, 1845, there were granted to the state of Iowa, "All salt springs within the state not exceeding twelve in number, with six sections of land adjoining or as contiguous as may be to each," and there were approved in all to the state of Iowa by the secretary of the interior a certain number of acres, and that said approved lands were certified to the state of Iowa in 1856 by the acting commissioner of the land office of the United States under the act of Congress approved August 3, 1854. He also certifies that the state of Iowa, by the provision of Chapter 105 of the Acts of the Eighth General Assembly, also known as Secs. 1956, 1957 and 1958 of the Revision of 1860, approved the saline lands and funds to the

state university to become a part of the permanent fund of said institution, and that an exhibit attached to said certificate shows the section of land in which is located the one acre in controversy thus set apart to the University fund.

The patent issued to defendant by the state, dated September 3, 1912, and duly recorded at about that time in Davis county, is in part as follows: Whereas, J. Mose McClure, of Davis County, Iowa, has deposited in the office of the Secretary of State, of the State of Iowa, certificate of the Treasurer of the State University of Iowa whereby it appears that full payment has been made by the said J. Mose McClure according to the provisions of the Acts of the General Assembly approved January 22, 1853, entitled "An Act to Dispose of the Saline Lands," for the N. E. quarter of the S. E. quarter of Section 10, Township 70, North of Range 12 West of the 5th P. M., containing forty acres according to the official plat of the survey of the said land returned to the General Land Office of the United States by the Surveyor General, which said tract has been purchased by the said J. Mose McClure; now, know ye, that the State of Iowa, in consideration of the premises, and in conformity with the several acts of the General Assembly, have given and granted, and by these presents do give and grant, unto the said J. Mose McClure, and to his heirs and assigns, the said tract of land above described; to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, excepting all buildings and improvements on said land, unto the said J. Mose McClure and to his heirs and assigns forever. This patent is executed by the proper officers of the state.

The deed to plaintiff before referred to from Edwin Manning and wife to the one acre in question recites:

"For and in consideration of an abandonment of the present schoolhouse site on the N. E. quarter of S. E. quarter of Sec. 10-70-12 by the grantee herein, and its reversion to

the grantor herein, and for the purpose of changing the schoolhouse site of the grantee herein, we do hereby sell and quit claim to the Des Moines Independent School District of Salt Creek Township all our right, title and interest in and to the following described real estate:" (Describing the one acre in question.)

This deed is dated July 21, 1881, and is duly acknowledged and recorded March 26, 1884. It appears by concession and upon the evidence that shortly after the deed just referred to, and in 1881, there were \$500.00 in bonds voted to construct a schoolhouse in said district, and that the money so raised was expended in the construction of the schoolhouse as now located on the one acre of ground in question. Witnesses for plaintiff, who were members of the board of directors of plaintiff district, testified in substance that they believed the deed to be valid, and that they built the schoolhouse and made the improvements relying upon the deed.

By agreement, an abstract of title was offered in evidence in place of the records. The first of the entries on this abstract is No. 3, by which S. T. Caldwell and wife convey to Edwin Manning, by quit claim deed, the N. E. of the S. E. of 10. This deed is dated May 18, 1865. Item 1 on said abstract shows a grant from the United States to the State of Iowa of Section 10, selected as saline land, but does not show any conveyance from the state to anyone until the patent to defendant in this case which has been before referred to, and no evidence was introduced of any kind showing such a conveyance, so that the conveyance by Caldwell and wife to Manning was by a stranger to the title.

It is conceded that the acre in controversy had been occupied for school purposes since 1881. It is conceded by the defendant that Captain J. A. T. Hull was a resident of Davis County, Iowa, during the 70's, and from 1879 to 1885 he was secretary of state, and that during his incumbency of that office, and prior thereto, he knew of the existence of the

schoolhouse in controversy at its present location, and that prior to 1881 the log schoolhouse was located on the same forty, but not on the acre in controversy.

A further concession was that B. F. Carroll was born in Salt Creek Township, Davis County, and taught school in the schoolhouse in controversy some time in the 80's, and that in 1902 he was elected auditor of the state of Iowa, and was acquainted with the schoolhouse and its location prior to his election, and during his six years' incumbency in office as auditor and four years as governor of the state, to January, 1913, he knew of the existence of this schoolhouse and its location ever since it was built, in 1881.

It was shown that the plaintiff had existed as a school corporation since 1846, and that each year school was conducted there by taxes raised on the property in the district and from apportionment each year from the state school fund, and that during each of said years to the present time there have been school children of school age to attend and who did attend said school. From 1865 to 1884, the forty acres were assessed to Edwin Manning, who paid the taxes; from 1885 to 1898, thirty-nine acres of said forty acres were assessed to him. There is evidence of the directors and others that they never heard that the acre in controversy was ever claimed by the state, and that defendant lived in the neighborhood for years and knew of the schoolhouse and that school was being carried on in the building on the acre in question, and that he knew the circumstances of the building of the schoolhouse before he bought the land of the state. The first schoolhouse was situated one-fourth of a mile north of the present one, but on the same forty acres.

Defendant offered in evidence the different acts of Congress, acts of the general assembly, reports of the land office and other documents in regard to the saline land grant covering the land in question.

By its decree, the court found the ownership and occupancy of the two school sites in accordance with the facts

before recited, and that the defendant is the owner of said one-acre tract in the southeast corner of said forty acres by patent, as recited in the evidence, and, further, that prior to September 3, 1912, the state was the owner of said tract of land, and that neither the defendant nor the state, his grantor, have by their acts, conduct or omissions become estopped from asserting their title in and to said acre as against the plaintiff, and that defendant is entitled to have his title quieted, and that plaintiff's petition should be dismissed.

Appellee cites *Park Commissioners v. Taylor*, 133 Iowa 453; *Carr v. Moore*, 119 Iowa 152, 159; *C. R. I. & P. R. R. Co. v. Council Bluffs*, 109 Iowa 425, and other cases, on the point that there can be no adverse possession, and that the statute of limitations does not run as against the state; and *Cedar Rapids v. Young*, 119 Iowa 552, holding that the levy and collection of taxes on property will not estop a city from asserting title to the property for the public.

It is said by appellant that the question as to whether estoppel ever operates against the state has never been before this court for determination. But they say that the doctrine of estoppel has been applied against the agencies of the state, such as counties and cities, as well as against persons, citing *Bullis v. Noble*, 36 Iowa 618; *Foster v. Bigelow*, 24 Iowa 379; *Schafer v. Wilson*, 113 Iowa 475; *Iowa R. R. Co. v. Fehring*, 126 Iowa 1; *Sioux City v. R. R. Co.* 129 Iowa 694; *Simplot v. Dubuque*, 49 Iowa 630; *Audubon Co. v. Am. Emigrant Co.*, 40 Iowa 460; *Adams Co. v. R. R. Co.*, 39 Iowa 507. They also claim that the doctrine of estoppel is applied against states in their dealings with individuals, citing *State v. Milk*, 11 Fed. 389; *U. S. v. Stinson*, 125 Fed. 907; *Simplot v. R. R. Co.*, 16 Fed. 350; *State v. School District*, 88 N. W. (Minn.) 751.

For appellee, it is contended that, in order to constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to

whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on and acted upon it to his prejudice; citing 16 Cyc. 726; Bigelow, Estoppel 569. That in cases of estoppel which affect the title to land, it has been laid down as a general proposition that the estoppel must possess an element of fraud; that in order to establish an equitable estoppel against one asserting his title to real property, the party attempting to raise it must show actual fraudulent representation or concealment, or such negligence as would amount to fraud in law, and that the party setting up such estoppel was actually misled thereby, to his injury; that fraud or bad faith is a necessary ingredient of estoppel based upon misrepresentation by passivity. *Dye v. Crary*, 9 L. R. A. (N. S.) 1136; 16 Cyc. 728-730.

It is also contended that when the foundation of the estoppel is silence and omission to give notice of one's rights, the party relying upon the same must in fact have had means of ascertaining the true state of the title by reference to the public records. *Thor v. Oleson*, 125 Ill. 365. That a public record is an available means of information as to questions of title, and one who does not take advantage of it cannot claim an estoppel against one who merely fails to furnish such information. *Jones v. Brandt*, 59 Iowa 332; *Bradley v. Gelkinson*, 57 Iowa 300. Estoppel by misrepresentation is a form of estoppel. 16 Cyc. 671, 722. As stated in 2 Pomeroy's Equity Jurisprudence (3rd Ed.) Sec. 803:

"There is a theory which makes the essence of equitable estoppel to consist of fraud. In accordance with this view, the language used by some courts in defining and describing the general doctrine has been so sweeping and positive that, taken literally, it does not admit the possibility of such an estoppel unless the party has been guilty of actual intentional fraud in law; and thus the whole doctrine is repre-

sented as virtually a mere instance of legal fraud. This theory is not sustained by principle, and it cannot be made universal. . . . It is accurate, therefore, to describe equitable estoppel, in general terms, as such conduct by a party that it would be fraudulent, or a fraud upon the rights of another, for him afterwards to repudiate and to set up claims inconsistent with it."

Appellee cites *Cedar Rapids Water Co. v. City of Cedar Rapids*, 117 Iowa 250, where the court quoted from Reese on Ultra Vires, to the effect that any person having no authority to act cannot, by his conduct, estop others not responsible for his conduct. Accordingly, no estoppel can ordinarily arise from the act of a municipal officer done in violation or without authority of law. Also, the following cases to the effect that the state and a party claiming under the state could not be estopped by unauthorized acts of city officials: *Cedar Rapids Water Co. v. Cedar Rapids*, *supra*; *McGillivray v. Barton*, 96 Iowa 629; *Taraldson v. Lime Springs*, 92 Iowa 187; *Solberg v. Decorah*, 41 Iowa 501; *Gill v. Appanoose Co.*, 68 Iowa 20.

The point is made by appellant that Captain Hull and Governor Carroll knew that a public school was being conducted in a schoolhouse situated upon the forty-acre tract under consideration, and that they afterwards became state officers. But there is nothing in the record to show that these men, while they were state officers, knew anything of the condition of the title of any part of the forty-acre tract. The appellant entered upon this property without the consent of the state or its officers, and the record does not show that while these two men were acting as state officers they knew appellant claimed any interest in the one acre of ground under consideration.

We do not understand appellant to now claim that the statute of limitations will run against the state. In fact, a number of matters pleaded by appellant in its reply are

not argued or now relied upon. It is said for appellant in argument that the only question in the case is, whether an estoppel may in any case operate against the state, and whether, under the facts of this case, there is an estoppel. Without now determining whether, in any case or under any state of facts, there may not be an estoppel against the state, we are of opinion that, under the evidence in this case, the showing is not sufficient to work an estoppel, even though the doctrine can be applied to the state. The plaintiff merely occupied a part of this forty acres conveyed by the state to the defendant. The land used as the first site was without any right, and the second was under a deed from a person having no title. The title was all the time in the state, under a grant from the Federal Government, until it issued a patent to the defendant in 1912. The state, according to plaintiff's own theory, merely remained passive. No fraud or misleading statement is shown by the state or its officers. There is nothing in the record to show that the state or its officers intended or expected its conduct to be acted upon by plaintiff or the public generally, nor is there anything to show that the silence of the state was relied and acted upon by plaintiff to plaintiff's prejudice. The evidence shows that the improvements were made on the one acre in controversy in 1881, soon after the deed to it from Manning, and that it relied on the deed. It certainly cannot be now claimed by appellant that the after silence of the state induced the building of the school-house, or that appellant relied upon such silence or in any manner changed its position by reason of the passivity of the state. Plaintiff simply occupied the land and made the improvements thereon without right as against the state. At no time was the state, nor were its officers, placed in a position by which it was required to speak or assert its claim. Under such circumstances, appellant acquired no right or title as against the state or the defendant, its grantee, and the mere silence of the state and its officers would not constitute a fraud on its part, nor would it be a fraud upon the appellant

for the state or its grantee to now assert its rights to the entire forty acres conveyed by the state to the defendant. It is said by appellant that the defendant, McClure, knew the schoolhouse was located on the present site before he obtained his patent from the state, and that the possession by appellant was notice to defendant of the appellant's rights. But we have shown that appellant had no rights as against the defendant or his grantor, the state. Possibly the deed from Manning to the school district in 1881 would be color of title as between individuals, and a basis for adverse possession, but we have already stated that appellant does not rely upon adverse possession.

We conclude that the decree of the district court was right, and it is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS, LADD and WEAVER, JJ., concur.

WM. TACKABERRY COMPANY, Appellant, v. SIMMONS WAREHOUSE COMPANY et al., Appellees.

NEGLIGENCE: Act of God—Unprecedented Floods. An unprecedented flood may constitute an "act of God" as that term is used in law. Evidence reviewed and held to show that the flood in question was, as a matter of law, unprecedented and therefore an act of God.

WATERS AND WATERCOURSES: Bridges—Construction—Duty of Authorities to Anticipate Floods—Negligence. The unreasonable is never required; for instance, a city, in the construction of its bridges, is not required to anticipate and provide for unprecedented floods and debris carried thereby, which could not reasonably have been foreseen.

PRINCIPLE APPLIED: Action against a city and another defendant on the claim that a bridge constructed by the city and a conduit in connection therewith were negligently constructed and a nuisance, in that it was inadequate in size and thereby caused an overflow with consequent damage to plaintiff. The evidence traced the flood conditions of the region through a period of some fifty years, and revealed the fact that at no prior time had the region been visited by a flood of as great magnitude

as the one in question. The bridge in question had been constructed much larger than appeared necessary and proved sufficient to care for all floods prior to the one in question. There was evidence that the bridge and conduit, as constructed, carried a greater volume of water than would have been carried along the natural condition of the banks. *Held*, the evidence showed that the flood was unprecedented, and that the city was not negligent in not providing for it.

NEGLIGENCE: Act of God—Concurring Negligence. Negligence of

- 3 man may so intermingle with an act of God as to fix responsibility for damages when but for such negligence the plea and proof of an act of God would be a complete defense, but such negligence must be proximate; that is, it must appear that the injury would not have happened but for such negligence. *Held*, the principle had no application because negligence was not shown.

MUNICIPAL CORPORATIONS: Reasonable Care—Duty to Exercise

- 4 —**Good Faith Reliance on Expert Advice—Bridges.** A city must exercise reasonable care in building its bridges; in other words, it must avoid negligence. It is not required, however, to secure the impossible, i. e., absolute perfection of human wisdom in its servants and agents; therefore, if, in the building of a bridge, it secures the services of a competent and skilled engineer, and in good faith adopts his plans and builds accordingly, it performs its full duty to exercise reasonable care and is not liable for resulting damage, until time and experience have given it notice that the bridge is in fact insufficient. So held in case of a bridge which had, prior to the flood in question, proven of sufficient capacity to care for all waters.

MUNICIPAL CORPORATIONS: Adopting Plans of Engineer—Vari-

- 5 **ation Therefrom—Effect.** A city adopting in good faith the plans for a bridge drawn by a competent engineer is not deprived of the protection which the law extends to such commendable care by the fact that in building the bridge certain modifications or additions are made which in no wise contributed to the injury of which complaint is made.

PRINCIPLE APPLIED: A city built a bridge under plans drawn by a competent engineer. In the actual building, a concrete slab was substituted in place of a former sidewalk for foot passengers and certain steel girders were installed which were not in the plans. The girders did decrease the opening under the bridge. A flood, the largest known in some fifty years, proved too great for the capacity of the bridge and overflowed the surrounding street and flooded plaintiff's property.

Up to this time, the bridge had cared for all floods. Had the girders not been installed, the overflow would, nevertheless, have occurred. *Held*, the city was not liable.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

MONDAY, MAY 10, 1915.

ACTION for damages for flooding the basement of plaintiff's business room and the destruction of merchandise by water alleged to have been diverted from Perry Creek by obstructions which were alleged to have been placed therein by the defendants. It was also asked that the nuisance thus maintained be abated. The cause was tried to a jury. At the close of plaintiff's evidence, the court sustained a motion to direct a verdict for the city. The motion was based upon numerous grounds, one, and perhaps the chief, of which was upon the claim of the defendant city that the bridge was constructed by it in its governmental capacity, from plans drawn by a competent engineer and adopted by the city. At the close of all the testimony, the court sustained a motion to direct a verdict for the other defendant. This motion was on numerous grounds. But it seems to be conceded that the chief ground of the ruling was the claim that the storm and flood was such an unprecedented one as to constitute an act of God. Plaintiff appeals.—*Affirmed*.

M. L. Sears and Edwin J. Stason, for appellant.

F. L. Ferris and Lewis S. Haslam, for appellee, Simmons Warehouse Company.

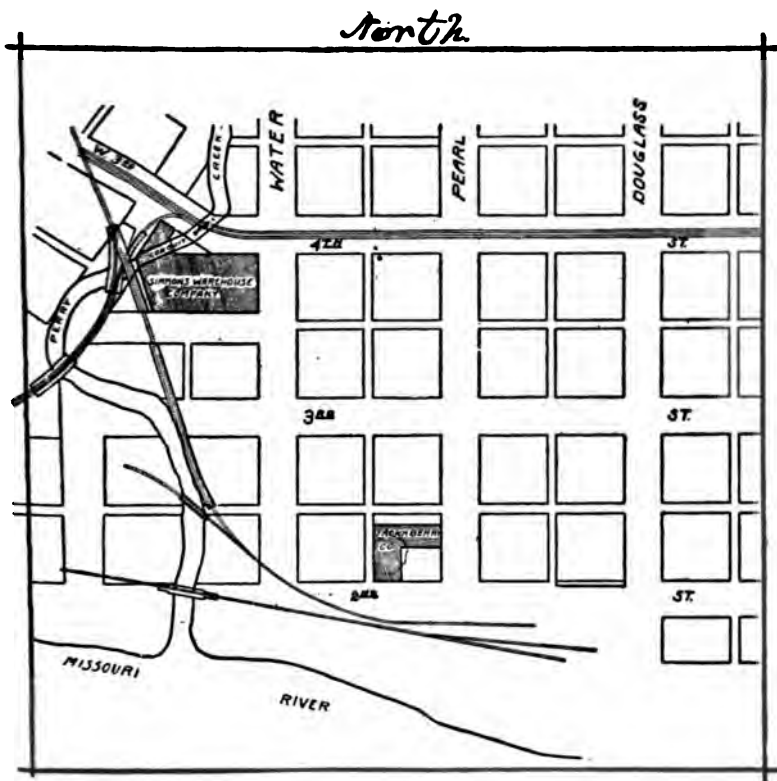
A. C. Strong, F. E. Gill, Sam Page and Schmidt & Pike, for appellee, City of Sioux City.

PRESTON, J.—The case has been here before, 154 Iowa 358. As originally brought, the suit was against eighteen other defendants. The former appeal was from a ruling sus-

taining motions by defendants to separate on the ground that the allegations of the petition did not show a joint liability. That motion was sustained by the district court and affirmed in this court. In a supplemental opinion on the former appeal, it was suggested that, if plaintiff should choose to confine its petition against the two present defendants to an alleged cause of action wholly joint, and to eliminate therefrom all allegations upon which several liability can be predicated, it might be done. On the case being remanded, plaintiff filed a substituted petition as against the two present defendants, by which it sought to charge a joint liability. When the case came on for trial again, these defendants again filed motions to separate, which were overruled. The substituted petition, as did the original petition, charged that the defendants were maintaining a nuisance by obstructing the creek, and also charged them with negligence. A somewhat extended abstract of the allegations of the original petition is set out in the opinion on the prior appeal, and we shall endeavor not to repeat what is there set out, but simply refer to the former opinion. As to the alleged joint liability of the defendants, the substituted petition alleges, substantially, that the defendant city was wilfully, carelessly, negligently and improperly maintaining, in conjunction with and as a part of a single and continuing structure with the structure of its co-defendant hereinafter described, a large iron bridge in and across said creek, in such a manner as to materially lessen the capacity of said stream and to prevent the water thereof from flowing in its usual channel into the Missouri River; and, in connection with said bridge, the said defendant was similarly maintaining a closed apron to the south of the bridge and closely joined with it, in such manner as to prevent overflow water from the creek from returning to the channel thereof. Similar allegations are made as to the defendant, Simmons Warehouse Company, in regard to a cement conduit. The defendants filed separate answers, denying the allegations of the petition, admitting the existence of their struc-

tures, alleging that each structure was erected and maintained independent of the other, and setting up other defenses which will be referred to in the course of the opinion.

The case is now here for review upon the testimony introduced. The determination of the case turns largely on the



question whether, under the undisputed evidence, the flood which caused the damage to plaintiff, and which occurred July 10, 1909, was an unprecedented one. Though the testimony on this branch of the case had not been introduced, except as it was brought out in plaintiff's case in chief, at the time the court sustained the motion of the defendant city for a verdict, it was one of the defenses of the city that the

flood was unprecedented, and that defense is common to both defendants.

It would not be practicable to attempt even to set out any considerable part of the testimony within the proper length of an opinion. We are abundantly satisfied from a reading of the entire record and the elaborate and carefully prepared arguments of counsel that it was such a flood as is contended for by defendants.

A large plat was introduced in evidence, showing the meanderings of the creek within the city limits and the different streets over which the water came from the north. We here set out a part of this plat, showing the immediate situation of plaintiff's property, the bridge in question at Fourth Street and West Third Street, the property and conduit of the Simmons Company and the creek at this point, the pile bridges of the Milwaukee Railway and the bridge of the Sioux City Service Company just below the conduit in question. These pile bridges are referred to by some of the witnesses as forming a letter V.

There are other bridges of other companies and of the defendant crossing this creek above Fourth Street, and three railway bridges below. The railway embankment south of plaintiff's property is about two feet high. The creek has numerous bends within the city. Commencing at West Ninth and Fourteenth Streets, the creek runs east for about a block, then southeast, then south about half a block, then southwest, then southeast, then sharply to the southwest, or nearly west, then turns in a large bend and runs northeast to a point between Eleventh and Twelfth Streets, then nearly south, then southeast, then south, and at Ninth Street nearly west, turning in a bend to the east again, crossing Pearl Street, on which plaintiff's property is situated, between Eighth and Ninth Streets, then southwest again, crossing Pearl Street and running then southwest about four blocks. This bend extends west of Water Street about a block and a half, then runs southeast, then south to the bend shown in the plat.

Plaintiff's property is at the lowest point. The ground slopes towards the creek for a little distance back. The properties of plaintiff and the defendant Warehouse Company are in the business district. Some of the buildings above Fourth Street are built on the edge of the creek.

A map was introduced in evidence, showing the drainage area of this creek. It shows 72 square miles; length 24 miles; length of channel 37 miles; average fall 4.5 feet per mile. Other plats were introduced in evidence, showing the construction of the bridge and conduit in question, also a large number of photographs showing the destruction caused by this flood and the general situation.

1. Taking up now the question of fact as to whether there was an unprecedented flood on July 10, 1909, and without going too much into detail, we shall attempt to describe

1. **NEGLIGENCE:** in a general way the conditions as they ex-
act of God: isted. It is substantially conceded by counsel
unprecedented floods. for plaintiff that the rainfall was unprece-
dented above the city, for they say in argument that it is not
claimed that there was not an unusual and extraordinary,
if not an unprecedented, rainfall in the Perry Creek valley
ten or fifteen miles from Sioux City, neither is it claimed
that there was not, at the source of the creek, and in the
farming section through which the creek flowed in its upper
reaches, an unprecedented volume of water, nor that at some
points within the city limits there was not an unprecedented
amount of flood water accumulated in parts of the creek
valley, although the evidence does not show that there was
any rainfall within the city limits. But they contend that
the defendants failed to show, by that weight of evidence that
warranted the court in directing a verdict for them, that the
overflow of the creek between Sixth Street and the Fourth
Street bridge was due to an unprecedented amount of water
or rainfall which at any time reached that locality, and that
it was the overflow there that caused the damage. They con-
tend that the overflow was not due to an unprecedented vol-

ume of water at that point, but was due wholly to the obstruction placed and maintained in the creek channel by the defendants; also, that the flood waters from the north, by spreading out in the low lands and being held back by trees and vegetation, bridges and other obstructions, reached and were able to reach the neighborhood of the defendants' obstructions only in such volume as, if the channel had been unobstructed by the defendants' structures, would have passed to the Missouri River, with only the overflow, if any, into the streets and alleys of such quantity of water as is often found therein after a heavy rain, and which would have been taken care of by gutters and catch basins, without material damage to anyone.

With these contentions of plaintiff we are unable to agree. It is shown by undisputed evidence that a large amount of water fell in a short time and over a limited area. A large number of witnesses were introduced on this point by defendant, Simmons Warehouse Company, as to flood conditions both north of the city for some miles and within the city and south to the Missouri River, at the time in question, and as to prior high waters for forty-seven or forty-eight years. Plaintiff introduced no witnesses in rebuttal of this evidence. There is testimony as to high water in 1858, and another about 1869. But substantially all the witnesses are agreed that the high water of the year 1908 was, up to that time, the highest water along this creek ever known. One witness, an old resident, describes the bridge on his farm and says that the bottom of the stringers of the bridge is one foot above any prior high water mark. The stringers are twelve inches and the railing three feet high. In the flood of 1909, the water was three feet above that and was a mile wide. Prior to that, the water never got to the floor of the bridge. Prior to 1908, he had never seen this creek out of its banks along where he lived.

Another witness says that the flood of 1908 could not be compared with the flood of 1909. He had never seen the

debris as high by flood waters as it was in the flood of 1909.

Another witness who had lived on this creek for thirty years describes his granary, eighteen by twenty-four feet, which was situated on the highest ground, twenty or twenty-five rods from Perry Creek, which was filled with grain, and carried by the flood of 1909 down stream more than a quarter of a mile across the fields. A photograph of this granary and the place where it lodged was introduced in evidence, and the witness says:

"Exhibit 17 is my granary, and Exhibit 18 shows the tree where we got the granary. From my place down to where the building was found is half a mile of what is generally bottom; the whole thing was a sea of water. The water was four or five feet deeper than I ever saw it before."

Another witness testifies that the highest flood since 1879 was that of 1908, and the 1909 flood at his place was six or seven feet higher than that in 1908. He says:

"Along between eight and nine o'clock the flood came out of the north, and I did not know it was raining. It did not rain at my place; it raised fast; I started to wade out and it rose in ten or fifteen minutes from my knees to my chin. There were no trees around there that would stop any water."

Another witness who had lived on the creek for thirty-three years says:

"The largest flood I ever saw in Perry Creek was the one in 1909. My buildings were set about forty rods from Perry Creek; the flood of 1909 floated my cow barn and hog houses out and took away all my stock yards, cleaned it off as clean as a floor; no flood was ever up to my yards before. I measured the trees on the bank of the creek to where the mud and stuff would lodge and there was sixteen feet of water; I have never seen it over two or three feet before."

Other witnesses testify as to conditions above the city. A resident of the city for thirty-nine years, describing the condition of the water in the city, says:

"The largest amount of flood water I have ever seen come down Perry Creek was the rain of 1909; the next highest was in 1908. There was no comparison between these floods where I lived in Sioux City. The one of 1908 did not run past me at all, and the one of 1909 the water was like a river. I never saw the creek out of its banks before 1908. The flood of 1908 came within two feet, or such a matter, of the girders of that bridge at Fourth and West Third Streets, but the 1909 flood went right over the top of it."

Another resident of the city for twenty-one years says:

"The flood of 1909 was a great deal larger than that of 1908. The flood of 1908 came within half a block of the pumping station and the flood of 1909 extended beyond the station to half a block farther south. I saw people out in it waist deep around the corner of West Sixth and Main Streets; there was a strong current."

Another witness, living on Twelfth Street for twenty-four years, says:

"The greatest amount of flood water I ever saw come down Perry Creek was in 1909. The next greatest was the year before. In 1909 it was about twenty-two or twenty-three inches higher than in 1908."

Another witness, living on Omaha Street some ten or twelve blocks northwest of the bridge and conduit in question, says he made a notation of highest point of the water in 1908, and when the water was the highest in 1909 he measured it and found a difference at that place of twenty-seven inches; that is, the flood of 1909 was twenty-seven inches higher than the flood of 1908, and he testifies that the flood of 1908 was

greater than anything he had ever seen before; that at the fire house on West Seventh Street the water was four and one-half feet deep, and in 1908 it was a little over his ankles at that point.

Another witness, who had lived in Sioux City for thirty-nine years, and who lived on Water Street about two blocks north of the bridge and conduit in question, and whose place of business was at Fourth and Water Streets, says:

"There was a lot of water came out of Sixth and Lynch Streets on Water Street; the current was very rapid; never saw water flow down Water Street before the flood of 1909; never saw it out of the banks between Fifth and Fourth Streets before. During the flood of 1908 I observed the water passing under the Fourth and West Third Street bridge. It went through very easily; there was no damming or holding back."

Other witnesses describe the water coming from the northwestern part of the city in a southeasterly direction, and state that it went across the creek north of Fourth Street.

Another witness, who has lived near Perry Creek for forty-five years, says:

"The flood of July 10, 1909, was the biggest flood I ever saw. The bridge and conduit in the flood of 1908 took care of the water that came down Perry Creek."

Other witnesses give like testimony. Witness Skeels, who was formerly assistant city engineer, was a witness for plaintiff. It was stipulated that he was an experienced and capable engineer. He testifies:

"Since the flood of 1909 I have made a survey, with a view of ascertaining the extent of flood waters at various points on Perry Creek. The point nearest to the source of the stream at which I made a cross section is about fifteen miles north of the city. Exhibit 28 shows the length of that

cross section to be 800 feet. The superficial area of the cross section of the flood at that place was 2,960 feet; in that cross section the little cup which appears in the left of the picture represents the channel of the creek. The width of the creek at that point from high bank to high bank was practically 100 feet. The area of the capacity of the channel of the creek at that point is between four and five hundred feet, or about one-sixth. From the examination of Exhibit 28, a channel would be required to carry these flood waters, without overflow of the creek, in 1909, at that point, approximately fifteen feet deep and two hundred feet wide."

He testifies as to other cross sections north of the city:

"The next cross section I made was on Main Street at West Sixth and another at Fifth Street just west of Water Street; the width of the flood waters there was 1,800 feet; the area of the cross section of the flood was 3,811 feet. There is also a comparative cross section of the channel on the south line of Fifth Street; the width shown from bank to bank of Perry Creek at that point is thirty-four feet; an area of 539 feet is shown, which represents the utmost carrying capacity of the stream at that point, without overflow."

Plaintiff's witness Ford noticed the flood in 1909 at two o'clock in the morning. He says:

"The water at half past two was out of the banks at the Pearl Street bridge where the land was low, and at that time there was a lot of water over on West Seventh Street."

The point described by the witness is about five blocks north of plaintiff's property and on the same street. He says further:

"At five o'clock I first noticed the water coming across up on Sixth and Park; that would be east of the creek; went to the Fourth Street bridge about six o'clock. As soon as the

water broke across Water Street I went directly to the bridge to see what was wrong; the water came across Water Street between five and six o'clock; the first water that came on Water Street came off of Park at Sixth; the creek could not carry it and it flowed down Park Street; some went down Water."

The point just referred to is two blocks north and a little west of the bridge and conduit in question. Witness continues:

"After the water came out of the alley about 150 feet north of the Fourth Street bridge, I visited the bridge as soon as it broke across, at that time the Fourth Street bridge was running clear. After that I went to the corner of Third and Pierce, Second and Pierce, Third and Pearl, Second and Pearl, Third and Water, and opened up the catch basins. It might have been six o'clock when I got back. When I went to open up the catch basins at Third and Pierce the water was about eight inches deep. At Third and Douglass it was so deep that I couldn't find the lift to the man-hole."

It is two blocks east and one block south of appellees' structures to Third and Douglass Streets and three blocks east and one south to Third and Pierce Streets. According to the testimony of this witness, the water had not yet flowed over the Fourth Street bridge, because he had testified that at that time the Fourth Street bridge was running clear. The witness further continues:

"After getting breakfast I got back to the Fourth Street bridge a little after seven. The water was then flowing over the top of the Fourth Street bridge. The water that came out on to Water Street between Fifth and Sixth divided and most of it went down to Fourth and Water. . . . Not any of the water that went east of Park Street got back into

the creek unless some of it flowed down Water Street. The flood waters west of the creek came down in the direction I have described and went back into the Perry north of the Sixth Street bridge. The creek could not carry it all at the Sixth Street bridge. The Sixth Street bridge got choked up with stove wood and all kinds of rubbish, and that is why that flood came over this way instead of going down Perry Creek. The water went straight across on account of the dam at the bridge. . . . I think the flood of 1909 was positively the largest flood we have had since I have had any remembrance of the city."

It is contended by appellees: "That a flood of unprecedented volume was precipitated into Perry Creek and came down into the city, a wall of water, with the rush of a tidal wave, as shown by the testimony, and practically undiminished, as shown by the cross section of the water works station on Main Street, which is but a few city blocks above the said bridge at Sixth and West Fourth Streets."

Between the latter point just mentioned and the city bridge and the conduit complained of, the appellant claims that the flood was not unprecedented, and that, if the banks had been unobstructed and open, no overflow would have occurred. Without again setting out the cross section areas at these points, we are satisfied from the record that the creek, unobstructed, could not have carried the volume of water at Fourth Street. It seems to us, under the evidence, that at no point between the place where the storm occurred and the outlet of the Simmons Warehouse Company's conduit was the bed of Perry Creek of sufficient capacity to carry the flood waters precipitated into it. And it seems to us quite clear that the structures of the defendants did not cause the damage to plaintiff. It is shown without dispute that an unusual amount of debris was carried down the creek and that it lodged against the piling of the different bridges above and below the bridge and conduit complained

of. The witnesses say that there was more debris than they had ever seen before. The bridge and conduit complained of carried all the water brought to them until debris lodged in and against them. It is shown that an entire building lodged against the bridge and a part of the roof of another building.

A witness for plaintiff, who was interested in the property across Water Street east from the Simmons Warehouse Company, testified:

"After the bridge completely choked is when the water rose the highest there until they opened the bridge again. I think it was about eight o'clock, between seven and eight, that it got up to the highest. I wouldn't say it was that building that blocked the upper end of the bridge, but it was the debris that practically choked the bridge."

Q. "And that is what threw the water out in the largest quantities in and about where you are interested?"

"Plaintiff objects as calling for a conclusion of the witness, incompetent and immaterial."

Court: "He may answer whether that threw the water out."

"Yes, I think it was the stoppage of the channel there."

It is shown that they attempted to open up the bridge by the use of block and tackle and hauling out the debris with teams.

It is not contended by defendants that the bridge and conduit would have carried all the flood waters of this flood, for their utmost carrying capacity and the utmost carrying capacity of the wide-open banks of the creek would not have done so.

Perhaps we should refer to the testimony of the witness who was city engineer at the time the bridge and conduit were constructed, although it has a bearing on a point to be considered later. This witness testified that he had lived in Sioux City for forty-six years, and during all that period

had good opportunity for observing Perry Creek; that before the bridge complained of was built, he gathered what data he could as to prior high waters; that they made a great many inquiries from persons that had lived along the creek for thirty or forty years; that he had measured the volume of high waters for several years preceding the building of the bridge; that he thought they were leaving an ample opening; that they kept measurements of all high water; that the plans were drawn with that in view as sufficient to carry all known flood waters; that the bridge was made $33\frac{1}{3}\%$ larger than the largest amount of water he had known to go down the creek prior to that time; that afterwards, when the conduit of the defendant Warehouse Company was built, the plans were submitted to him; that he considered them ample to carry all the flood waters that came down the creek; that the flood of 1909 exceeded all floods he had ever known; that the next one in volume was that of 1908, but that the flood of 1909 exceeded the other; that at the time of the flood of 1908 he observed the water passing through the city's bridge and this conduit, and that the water passed through there freely in that flood; that there was no overflow of water anywhere that he knew of in that vicinity.

It is contended by appellant that the creek was narrowed at and above the Fourth Street bridge, and that the city was negligent in this respect, and thereby obstructed the flow of the water. But one of plaintiff's witnesses testified, and it is not disputed, that because of the smooth cement walls of the conduit and the walls of the buildings above the bridge, the openings would carry a third more water than the natural, uneven banks of the creek.

There is some speculation in the evidence as to how timbers might act in being carried down in a flood of this character. Plaintiff also complains that the girder on the up stream side of the conduit was too low, and that because, during the flood of 1908, the water came up to, or nearly to, this girder, it was notice to the city and its co-defendant of

the alleged nuisance. But it would seem that a complete answer to this is that these openings did readily carry the flood of 1908, and this flood of 1908 was, up to this time, the highest known. Ordinarily, the question as to whether the flood was an unprecedented one is a question for the jury, but it is not, of course, always so. Where the physical facts and conditions, as shown by all the evidence, are such that the minds of reasonable men could not differ, it becomes a question of law for the court.

We have not attempted to set out all the evidence. But, as before stated, we are satisfied from the entire record that the high water of July 10, 1909, was unprecedented and,

2. WATERS AND
WATER-
COURSES:
bridges: con-
struction:
duty of au-
thorities to
anticipate
floods: negli-
gence.

therefore, an act of God, and that a verdict for plaintiff, had the case been submitted to the jury, could not be sustained. The rule of the cases is that defendants are not bound to provide for unprecedented floods, but must anticipate and make provision for such floods as may occur in the ordinary course of nature. They must foresee and provide for unusual storms such as occasionally occur, whether they be called ordinary or extraordinary, but they are not required to provide for a flood which is not only extraordinary but unprecedented, and could not reasonably have been foreseen. This is the rule, as we understand it, whether defendants are charged with negligence or whether they are charged with maintaining a nuisance by obstructing the stream.

In addition to this, as to the defendant city, is the question as to whether it would not be relieved of responsibility in any event, because in building its bridge it adopted the plans of a competent engineer. This matter will be referred to later in the opinion.

The defendants would not be liable for the result of the clogging of the bridge and conduit by buildings and debris which it could not have been anticipated would be carried down by the water.

2. Appellant contends that, even though the high water was unprecedented, where negligence concurs with the act of God in producing an injury, the party guilty of the negligent act is responsible, provided the injury would not have happened but for such negligent act; that, while defendants could not in general be held for injury caused by an unusual and excessive rainfall, yet if the rainfall itself would not have run into plaintiff's basement and injured its property except for the careless and negligent conduct of appellees in failing to provide a bridge and conduit of sufficient capacity, defendants are liable.

3. NEGLIGENCE:
act of God:
concurring
negligence.

Appellant concedes that before this rule will apply, it must be found that the defendants were negligent and that, but for their negligence, the injury would not have happened; that negligence is not a proximate cause unless it be found that the injury would not have happened but for that negligence. The defendants do not dispute plaintiff's legal proposition at this point, but they contend that there is no negligence shown. The only negligence charged in the petition is that the bridge and conduit as constructed are not large enough to carry the water which the defendant should have anticipated.

For the city, it is further contended that, where a city council has in good faith adopted the plans and specifications for a bridge, prepared by competent and skilful engineers, who were at the time of its construction and prior thereto and thereafter familiar with the drainage area and conditions of the creek over which it was built, and who prepared their plans in the exercise of their best judgment and skill, and the bridge was constructed in accordance therewith, the city cannot be held liable, even though damage does result by reason thereof. That this is true, even though in the honest exercise of judgment it is not made of sufficient capacity to avoid injury, citing, among other cases: *Van Pelt*

4. MUNICIPAL
CORPORATIONS:
reasonable
care: duty to
exercise: good
faith reliance
on expert ad-
vice: bridges.

v. City of Davenport, 42 Iowa 308; *Bowman v. Humphrey*, 124 Iowa 744; same case 132 Iowa 234; *Hoehl v. City of Muscatine*, 57 Iowa 444; *Ferguson v. Davis County*, 57 Iowa 601; *Knostman, etc. v. Davenport*, 99 Iowa 589; *Houghtaling v. Railway*, 117 Iowa 540; *Walters v. Marshalltown*, 145 Iowa 457.

5. MUNICIPAL
CORPORATIONS:
adopting plans
of engineer:
variation
therefrom:
effect.

Plaintiff insists now in argument that the plans of the engineer were not adopted by the council. The following stipulation was entered into upon the trial:

"It is agreed that Exhibit 14 is considered in evidence. It is further agreed by and between the plaintiff and the defendant, city of Sioux City, that J. M. Lewis and G. Y. Skeels, city engineer and assistant city engineer, during and prior to the year 1903, were competent and skillful civil engineers, and were at the time of the construction of the Perry Creek bridge at Fourth Street, and prior thereto and thereafter, familiar with the conditions of Perry Creek and the drainage area, and that in the exercise of their best judgment and skill they prepared the specifications for the construction of Perry Creek bridge believing the same sufficient and proper, and that the city council in good faith adopted the plans and specifications in the manner as shown by defendant's Exhibit 14 and constructed the bridge in accordance therewith, but the plans and specifications did not include the steel girders or concrete slabs or apron extension subsequently placed upon the south ends of the bridge abutment in the manner and under the circumstances as shown by the evidence introduced."

The testimony of the engineers, heretofore referred to, was that the plans were based upon data they had gathered and observations and that, in their opinion, the structures as built were amply sufficient. The concrete slab referred to as not being a part of the plans was used in place of a former sidewalk for foot passengers over the creek. We are unable

to see that this could have anything to do with obstructing the passage of water under the bridge. The girders have been before referred to, and, while they doubtless did decrease the opening, yet the structures with the girders in did safely carry the high water of 1908. Under the evidence, we are clearly satisfied that, without these, the creek would not have carried the high water of July 10, 1909, and that, without them, plaintiff's property would have been flooded.

It is also contended by appellant that the rule that the city is not liable where it adopts the plan of a competent engineer does not apply where the city is causing a nuisance. Sewer and other cases are cited to the effect that, where the natural result of the structure is to injure the property of others, the city is liable, even though built upon plans of a competent engineer. In this case, if, after the bridge had been constructed under proper plans, it had been demonstrated by experience that it was not sufficient, the city would doubtless be liable after notice. Such is not the situation here. The bridge and conduit had proven sufficient for all prior high water. As before stated, plaintiff claims that the flood of 1908 was notice that the structures were not sufficient; but, as before shown, that was up to that time the highest flood, and the structure took care of that flood without injury to property. Whether it is called negligence or a nuisance, in so far as building its bridges of sufficient height and width to permit passage of water is concerned, the city is charged with the duty to use due care to build large enough. And this is based upon past experience as to rainfall, drainage area and other circumstances. The concession is that the council acted in good faith in adopting the plan. It is now contended otherwise in argument, but we find nothing in the record to show that the council acted in bad faith or that they were reckless or shut their eyes to known danger from flooding.

As to the Simmons Warehouse Company, the evidence already recited shows that the flood of 1909 was unprecedented and such as the defendants were not required to anticipate

and guard against. As stated, the only complaint alleged is that the openings were not large enough.

3. What has been said renders it unnecessary to discuss the question as to the joint liability of the defendants. The legal phase of that question was fully discussed upon the prior appeal under the pleadings as they then stood. The holding now is that neither defendant is liable because of the unprecedented character of the flood, and there is no negligence of either defendant shown which concurs with the act of God in causing the injury to plaintiff, and further, as to the city, that it in good faith built its bridge based upon plans of a competent engineer.

4. Plaintiff relies on a statement in the opinion in the case of *Sioux City v. Simmons, etc. Co.*, 151 Iowa 334, at 339, to the effect that the conduit was insufficient in size and faulty in construction. It is claimed by counsel for appellees that such statement was by reason of a misapprehension of the record in the former case. However this may be, and if it be true there was evidence in the former appeal to sustain such a finding, that evidence does not appear in this case. This case must be determined upon the evidence introduced here, and not upon the evidence in another trial where the parties are not the same.

Some other questions are argued, but those discussed are controlling. From a careful examination of the entire record, we conclude that the action of the trial court was right and in accordance with law and the facts in this case. The judgment is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and EVANS, JJ., concur.

J. E. ROBBINS et al., Plaintiffs, v. POWERS, Judge, Defendant.

WATERS AND WATERCOURSES: Enjoining Certain Maintenance
—Decree—Construction. The court, in an action to enjoin the raising of a dam, decreed that defendant be enjoined "from

maintaining any dam . . . other than the dam originally constructed . . . with flush boards . . . whereby . . . the water . . . shall be increased in height . . . in any manner . . . different than would be caused by said dam as originally constructed." In an action charging the owner of the dam with contempt for violating the injunction, in that he was maintaining the dam with "flush" boards, *held*, in the light of the language of the decree, aided by the pleadings, testimony, and opinion in the original suit, the owner was enjoined from increasing the height of the dam above its original height by use of "flush" boards or any other means, but was not enjoined from keeping the dam at its original height by "flush" boards or by any other means.

Certiorari from Sac District Court.—HON. F. M. POWERS,
Judge.

SATURDAY, DECEMBER 19, 1914.

REHEARING DENIED TUESDAY, MAY 11, 1915.

THIS is a certiorari proceeding in the nature of an appeal. It is brought in this court under the provisions of Code Sec. 4468, to obtain a review of the judgment of the district court of Sac County whereby the petitioners herein were found guilty of contempt for an alleged violation of a decree of injunction theretofore issued by this court.—*Annulled*.

Faville & Whitney and *M. Currie*, for plaintiffs.

C. D. Goldsmith, for defendant.

EVANS, J.—The consideration of this case involves the construction of a final decree of this court entered in a former case entitled *Watt v. Robbins*. The opinion of this court in such former case will be found in 160 Iowa 587. In pursuance of such opinion, a formal decree was entered. Upon complaint of Watt, plaintiff in the former case, the defendants therein and their successors in title were cited for contempt, and upon hearing, were adjudged guilty thereof. The present controversy involves the proper construction of

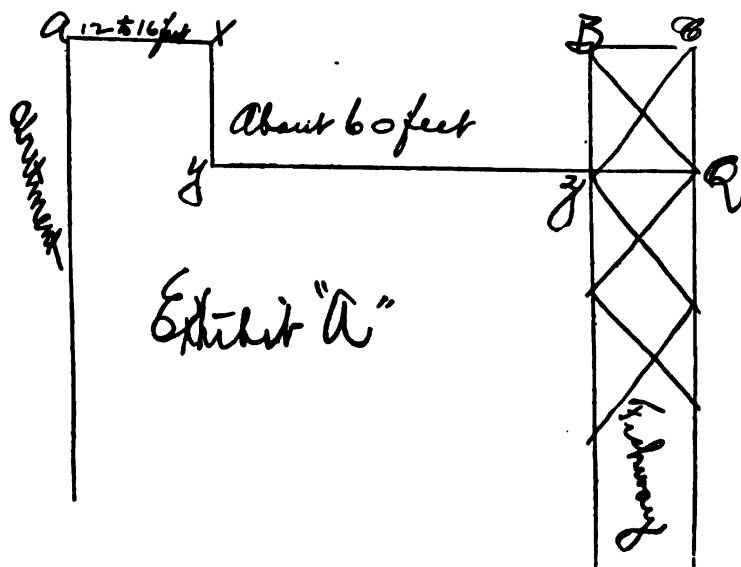
1. WATERS AND WATER-COURSES: enjoining certain maintenance: decree: construction.

the decree entered in such case. The facts of the present case and those of the former case are so interwoven that it will avoid confusion, we think, to ignore the title of the present case for the purpose of the discussion and to carry the former title in our references to the plaintiff and defendant. That is to say, Watt will be referred to in our discussion as the plaintiff, and the petitioners herein as the defendants.

Plaintiff Watt brought the former action on May 22, 1911. He averred that he was owner of land abutting upon a stream and that the defendants were owners of a mill dam maintained across such stream. His petition contained the following averment:

“That on the 20th day of May, 1911, the defendants having theretofore maintained a dam across the bed of said river that would in no manner, without raising the height thereof, interfere with plaintiff’s lands, and below plaintiff’s said lands, threaten to, and are now raising the height of the said dam, with the intention of keeping the same up and have and are thereby obstructing the flow of the water of said river, and thereby raise and threaten to raise it in the bed of the river, and thereby backing it upon the said farm and timber lands of plaintiff, to wit: To the height of two feet, thereby impeding and checking the natural flow of the water therefrom and causing the water so backed up and overflowing, to drown out and kill plaintiff’s timber and crops, and thereby diminishing the value of plaintiff’s said property to the damage of fifteen hundred dollars. . . . Wherefore, plaintiff demands judgment for damages in the sum of fifteen hundred dollars, and asks that a temporary writ of injunction do now issue restraining the said defendants from raising the height and maintaining the height of said dam so as to interfere with or overflow the said lands of plaintiff, and that upon the final hearing of this cause the said injunction be made perpetual, and for such other and further relief as may in the mind of the court be deemed equitable.”

Upon trial had, the district court entered judgment dismissing the petition. The plaintiff prosecuted an appeal to this court. The judgment below was affirmed here with one modification. This modification related to the alleged threat of the defendants to raise their dam to a greater height than its original construction. The decree enjoined the execution of such threat and enjoined the defendants from raising the dam to a greater height than the original construction. The opinion pursuant to which the decree was entered found the original height to be a "14-foot" head. The following sketch represents a cross section of the dam looking up stream.



The dam extends from A to B. To the left of A is the stone abutment. At the right of the dam between B and C is the fishway extending to the top of the dam. The dam is built of solid concrete, except the space between B, X, Y, and Z. This space is built up with boards to the line BX. The purpose of this construction is to protect the dam as a whole against the danger of being carried out by high

water. In such case, the board construction gives way first and thereby relieves the pressure on the main structure. The depth between X and Y and B and Z is 16 inches. The line AB represents the "14-foot head." It was the claim of Watt, as a witness, both upon the former trial and at the trial for contempt, that when he commenced his injunction suit against the defendants, they were putting boards upon such dam to the height of 26 inches. This would carry the height 10 inches above the line AB. At the time the defendants were cited for contempt, they were maintaining boards in such space BXYZ to a height of a little less than 16 inches. The boards thus used have been referred to throughout the record as flush-boards. The citation for contempt was based upon the claim that the defendants had no right under the decree of this court to use any boards whatever in such space. This would reduce the height of defendant's dam to a line 16 inches lower than a 14-foot head. The contention is that the decree of this court peremptorily forbade the use of flush-boards for any use whatever. The language of the decree relied on by appellee is quoted in his brief as follows:

"Wherefore, it is ordered, adjudged, and decreed that the defendants, and each of them, their servants, agents, and employees, be perpetually enjoined and restrained . . . from maintaining any dam or artificial obstruction other than the original dam . . . without flush-boards."

The foregoing quotation is literal as far as it goes. But it is wholly misleading because it stops in the midst of a sentence. The entire sentence in the decree from which the foregoing is taken is as follows:

"Wherefore it is ordered, adjudged and decreed that the defendants and each of them, their servants, agents, and employees, be perpetually enjoined and restrained from maintaining, . . . any dam or artificial obstruction, other than the dam originally constructed for mill purposes without

flush-boards or other means of obstruction whereby the flow of the water in said river shall be increased or raised in height, or to cause the water of said river to be backed upon, or overflow the land of plaintiff in any manner other, or different than would be caused by said dam as originally constructed."

The difference between the two quotations indicates the difference between the parties in their contention as to the effect of the decree. The defendants in the former action contend that they were enjoined only from increasing the height of the dam above its original height. We quote from the opinion the following: "We now come to consider the issue tendered by the plaintiff in which he seeks to restrain the defendants from a threatened wrong. . . . No complaint is made whatever of the dam as it existed there for many years prior to this 20th of May, 1911, and no relief is asked against the maintenance of the dam as it then existed. The plaintiff has invoked the powers of the law to restrain the defendant from in any way raising the height of the dam to the injury of the plaintiff. . . ."

"His right to maintain the dam as originally constructed is not called in question. It appears fairly well established by the evidence that to permit the defendant to raise the dam, as threatened, will have the effect of interfering with the flow of the water from plaintiff's land to the plaintiff's injury, and we think to this extent the decree entered by the court should be modified so as to grant an injunction against the defendants prohibiting them from raising the dam above the point at which it was maintained, to wit, to the 14-foot head."

The petition in the former case made no mention of flush-boards. No complaint was made either in pleading or evidence of the use of flush-boards as distinguished from any other means of raising the height of the dam. It was undisputed on the former trial that the owners of the dam were entitled to a 14-foot head. The same is undisputed in this

record. Watt himself testified to that effect on the hearing of the contempt proceeding. The testimony on the part of the defendants below shows conclusively that the boards used do not carry the height of the dam above the 14-foot head. There is not a word of evidence in contradiction of this testimony. Watt testified to his opinion that the dam with the use of such boards was higher than when originally constructed. He also testified that no flush-boards were used in the original construction. Only in that sense is there any contradiction in the testimony. To our minds, the material inquiry here is whether the defendants below, by the use of flush-boards or by any other means, have carried the dam to a greater height than a 14-foot head. There was no occasion for opinion or guessing on the question. It was capable of exact ascertainment. The constructor of the dam testified to it unequivocally. As long as the defendants below keep the height of their dam within the 14-foot head, Watt has no possible interest in the material out of which the dam might be constructed. If they were to reconstruct the dam and to use boards exclusively in its reconstruction, in what way could the lands of Watt be injuriously affected by such construction?

Watt's evidence that no flush-boards were used in the original construction, and that in his opinion the original construction was lower than the present height, was quite beside the mark. He himself testified that the flush-boards had been used for years prior to his former suit. His petition in such former suit, as above quoted, concedes that the dam was maintained at a proper height prior to May 20, 1911, which was two days before the beginning of his suit.

Construing the decree in its entirety and in the light of the pleadings and the opinion of this court pursuant to which it was entered, we hold that it forbade the defendants therein from increasing the height of their dam above its original height by flush-boards or by any other means whatsoever. As long as the defendants refrain from increasing

TUESDAY, OCTOBER 6, 1914.

REHEARING DENIED TUESDAY, MAY 11, 1915.

THE appellant, James Saling and Evert Emerson were indicted, charged with the crime of conspiracy to burn certain buildings and contents for the purpose of injuring the insurers. Appellant Madden was tried separately, and from a judgment against him he appeals.—*Affirmed*.

E. A. Lee, D. W. Higbee, S. A. Allen and Temple & Temple, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

PRESTON, J.—1. Appellant asks a reversal because of alleged error in overruling his motion in arrest of judgment and for a new trial: because, as he says, the indictment is bad for duplicity; because of the insufficiency of the evidence to support the verdict; error in instructions given and in the admission of testimony.

As to the first point, appellant contends that the indictment charges the commission of more than one offense. The indictment charges a conspiracy to burn property and com-
 1. INDICTMENT
 AND INFORMATION:
 duplicity: conspiracy:
 overt acts.
 mit a felony, to wit, arson. The defendant was put upon trial and tried for the single offense of conspiracy. The indictment alleges overt acts as a result of the conspiracy, in that it is charged that there were attempts to burn and burnings as a consummation of the conspiracy. It is also charged that it was with intent to injure the insurers of the several buildings and contents, which were described in the indictment. There could be several burnings under one unlawful combination or agreement. The indictment does not charge a conspiracy and, in addition, a separate and distinct charge of burning, as in some of the cases cited. As stated, the charge is conspiracy, and that the burning was the result or object of the conspiracy.

It has been held that where an indictment charges a conspiracy and also an overt act, which is in itself criminal, committed as a result of said conspiracy, the indictment is not bad for duplicity, where no conviction is sought on account of the overt act. *State v. Grant*, 86 Iowa 216; *State v. Ormiston*, 66 Iowa 143, 146.

In the *Grant case*, *supra*, the defendant was indicted and tried for conspiracy to obtain from several different persons their names and signatures to promissory notes, and it further charged that the defendant and his co-conspirators did obtain the signatures to promissory notes from several different persons as a result and consummation of the conspiracy. It was the claim of the defendant, Grant, in that case, that the indictment charged more than one offense. In passing upon this question, the court said:

"It is insisted with much confidence that the indictment charges more than one offense because the object, aim and purpose of the conspiracy is charged to be to obtain the signature of the several persons to several and distinct notes, and it is said each of these transactions constitutes a separate offense. The agreement to do these several acts, though consummated at different times, and with different individuals, and in some cases by different employees of the defendants, is charged as constituting a single conspiracy. As is charged, they are but a part and parcel of a single scheme. The conspiracy might embrace the purpose and object of obtaining signatures to notes from a hundred different individuals, and, so far as that fact is concerned, it would be none the less a conspiracy. The design charged was to obtain the signatures of all the parties named, and others unknown, to notes. Must it be held, then, that although there was but one agreement or arrangement which embraced the intention to procure all these notes, as to each note and each individual the conspiracy was separate? Manifestly, such cannot be the law. The agreement of the conspirators may contemplate dealings with one man or many, at the same or at different

times, in 'relation to the same or different matters. While in one sense the procuring of the signature of each individual to a note was a distinct transaction, yet each and all together constituted a single illegal aim, object, purpose, and agreement, and but a single offense. These several contemplated acts were a part of a system or scheme of conspiracy. Wharton Crim. Ev., Sec. 32; *Card v. State*, 109 Ind. 415."

It is alleged in the indictment in this case that the defendants conspired together to commit a felony, to wit, arson, and then the pleader enumerates the burnings caused by the defendants pursuant to the conspiracy.

It is also the claim of the appellant that no such crime as arson is known to the statutes of this state, and that, therefore, no crime is charged. The gist of the offense of con-

2. INDICTMENT
AND INFORMATION:
conspiracy: designating crime:
generally recognized
name: arson.

spiracy is the unlawful agreement or combination, and where this agreement is to perpetrate a crime known to the common law, or defined by statute in unmistakable terms, all that is necessary for the purpose of the in-

dictment is to designate the offense by using the name by which it is familiarly known. *State v. Clemenson*, 123 Iowa 524. And see, as having a bearing, *State v. Hardin*, 144 Iowa 264.

This court has designated as arson the different burnings as defined and made punishable under Secs. 4776 to 4780 of the Code. *State v. Harvey*, 130 Iowa 394. Though it is true that the point was not expressly decided in the *Clemenson* case, nor do the sections of the statute designate as arson the different burnings therein provided for, yet at common law arson is generally defined as the wilful and malicious burning of a house or outhouse of another, but the definition of the word has been extended to include the wilful and malicious destruction of other property by fire. The indictment charges a conspiracy to commit a crime which is generally known as "arson," and the use of that word alone would have been sufficient to advise the defendant of

the crime for which he was to be placed on trial. In addition to that, the indictment makes more specific the crime with which he is charged by setting out the different burnings that it is alleged he conspired with his co-defendants to commit. The crime intended to be accomplished by the conspiracy need not be described in the indictment with the accuracy or detail which would be essential in the indictment for the commission of the offense itself, but need only be designated as it is known to the common law or defined by statute. 8 Cyc. 665; *State v. Soper*, 118 Iowa 1, 4.

The crime that it is charged the defendant conspired to commit is included in the definition of arson as the word has become generally known and defined by the statutes and the courts.

It is true, of course, as argued by appellant, that proof of overt acts, under an indictment for a conspiracy, will not warrant a conviction of the felony perpetrated by the overt act. The jury was so instructed in this case, and it was plainly told that the conspiracy must be shown, and that there could be no conviction but for conspiracy. It is competent to prove overt acts, with other facts and circumstances, for the purpose of showing the common purpose by defendants and their intention, and to aggravate the conspiracy.

2. Defendant claimed on the trial that he and a co-defendant had hauled a certain number of loads of second-hand furniture from Creston to Cromwell, and that they put the furniture in one of the buildings burned. The teams, or some of them, had been hired for that purpose,—at least such was the claim of defendant. The State sought to prove, and there was evidence tending to show, that fewer loads were hauled. Defendant claimed that one Towne, who died before the trial, was one of the drivers hauling furniture. Towne and Stubblefield were looking after the draying business. Stubblefield, as a witness in rebuttal, testified that he had made an inves-

3. CONSPIRACY :
overt acts :
conviction for.

4. TRIAL :
stereotype
objections :
hearsay.

Q. "I will ask you if he didn't, or you didn't, send over to the house, and if you didn't call H. V. Woods and ask him to call the police?"

The objection to this question was sustained, but the witness answered: "I have stated that there was no such feeling against Earl Madden or any other person."

Defendant introduced evidence tending to contradict Mrs. Gidley in regard to some of these matters, and this was done somewhat in detail.

Nolen testified that he was present at a quarrel between Mrs. Gidley and defendant, and that she was going to hit Madden with a stove poker.

Mrs. Madden also testified as to a quarrel between defendant and Mrs. Gidley.

Defendant has no just cause of complaint at this point.

4. Witness Healey was permitted, over objection, to give his opinion as to the value of the load of furniture he took from Saling's store in Creston to the Madden property in Cromwell. The objection was that the witness

7. EVIDENCE:
opinion on
value: founda-
tion for: com-
petency.

did not show himself competent. Witness showed he had some knowledge of values of such property, and he described in a general way the character of the goods he hauled; said he handled all the articles that went on his wagon. The evidence was admissible for what it was worth. The weight to be given to it was for the jury.

It is argued that the court erred in allowing witness Reddick to testify as to the value of two loads of furniture. We do not find that this witness testified on that subject or that there was any objection to his evidence. From the reference to the abstract given, we suppose that witness Randolph is the one intended. The argument is not so much that the witness was not acquainted with values of such property, but that he did not observe the property closely enough to know what it was. The witness testified that he stood in front of his store and watched them unload the furniture; that he noticed

that it was old furniture, and mentioned that it was old, second-hand stuff; that he paid enough attention to the two loads to give an idea of the value. He described some of the articles he saw, and said he was acquainted in a general way with the value of second-hand furniture of that description. The evidence was admissible.

Witness McKean testified to hauling some of the furniture for Saling, and that Healey hauled one load; that Mr. Saling was after him in the daytime and he could not go in the daytime, he had to go at night. Then this question was asked:

Q. "Did you hear the conversation?"

The objection that this question was not cross-examination was sustained. It is said this was error. It was not cross-examination. Further than this, there was no offer to prove

8. TRIAL: witnesses: excluding answer: necessity for error to appear.

that the witness did hear the conversation, and, if he heard it, what the conversation was. We might reverse and send the case back and get an answer that he did not hear, but we

would not be justified in so doing.

The county attorney, in argument, referred to the fact that James Saling, jointly indicted with defendant on trial, did not become a witness in this case. This was objected to,

9. TRIAL: argument: reference to failure of co-defendant to testify.

and the court held that Sec. 5484 of the Code applies only to the defendant then on trial. It seems to have been so decided by this court. *State v. Hogan*, 115 Iowa 455, 460.

5. Appellant complains of a clause in Instruction No. 7.

We do not set out all of this instruction, but enough to show the proper connection with the part criticised. The clause

criticised we give in italics. A part of Instruction 7 is as follows:

10. CONSPIRACY: declarations and acts of co-conspirators: limitations: instructions as a whole.

" . . . A conspiracy may be shown, as stated above, by evidence more or less circumstantial in its character. It may be shown

by what is done by each of the parties in furtherance of a

common design, if any such acts are shown, by what system or concerted action between them appear from their acts when viewed as a whole. In determining whether or not the defendant, Earl Madden, James Saling, and Everett Emerson, or any two of them, including the defendant, Earl Madden, entered into a conspiracy between themselves as charged in the indictment, *you should consider so far as shown by the evidence, all that was said and done by the parties, whether or not they acted in concert in the accomplishment of a common purpose, what the purpose was, if the same is shown.* And from these facts, and all the other facts and circumstances shown by the evidence, you must determine whether the defendants, or any two of them, including the defendant, Earl Madden, did enter into a compact or conspiracy between themselves to commit a felony, such as is charged in the indictment herein, as in these instructions defined to you. The proof will be sufficient if it shows that the said conspiracy was entered into Union County, Iowa, and within three years next preceding the 24th of January, 1913."

The objection is, as counsel put it: "This instruction is erroneous, in that it does not confine what was said and done by the parties to the time between the formation of the conspiracy and the consummation of the acts conspired to be done, but left the question open to the jury to consider all that was said or done by either of the parties at any time prior to the trial of this cause; that the acts and declarations of the parties to a conspiracy are only admissible when such acts and declarations occur in furtherance of the conspiracy and after the conspiracy is formed, and within the limit of time between the time of the forming of the conspiracy and the consummation of the acts conspired to be done."

Taking the part of Instruction 7 in italics by itself, as counsel for appellant do in argument, it might seem that the court was covering the point as to the limit of time within which acts and declarations might be considered. But we have

set out enough of Instruction 7 to show that the court in this instruction was referring to the manner of proof; that is, that it might be shown by circumstances, together with acts and declarations.

Instruction No. 10, we think, covers the objection made by appellant. Instruction 10 is:

"Evidence has been admitted touching certain acts and statements made by James Saling, not in the presence and hearing of the defendant, Madden. Such acts and statements cannot be considered by you against the defendant, Madden, unless you find from all the other facts and circumstances in the case that a conspiracy had been previously entered into, substantially as charged in the indictment, and that said acts were done, and said statements were made—if they were done and made—by the said James Saling in the furtherance of, or in promotion of such conspiracy, if you find there was one."

This properly limits the acts and statements of Saling, which the jury might consider, to such as were done and said after the conspiracy had been formed and while the agreement still existed; that is, before it was terminated.

6. Counsel for appellant contend that the evidence is not sufficient to support the verdict, and say that they deem this to be the ruling question in the case. It is becoming common practice in substantially every criminal case, and many civil cases, for counsel to present cases in this court as though we were the triers of fact. This is a mistaken notion. Should

11. CONSPIRACY :
conviction :
evidence : suf-
ficiency : facts
reviewed.

we assume that function, it would tend to still further encourage long records, increased expense for litigants and additional labor for counsel and the court. Jurors are not infallible, of course, and there may be instances where, because of the character of the case, prejudice of the jury, or some other cause, we ought to interfere with the finding of the jury. It ought not to be assumed that every jury case will be tried *de novo* in this court, and that we should assume to determine

disputed questions of fact. The writer is strongly impressed with the belief that in ordinary cases the combined judgment of twelve jurors on questions of fact is better than his own, or even a full bench of judges. The jurors see the witnesses, they are drawn from the body of the county from different walks of life, and understand the motives and feelings of the witnesses. There are other good reasons why jurors can better weigh the evidence and why they will, as a rule, more nearly arrive at the truth than judges who do not see the witnesses or the attorneys and their manner and methods, and who do not see the general conduct of the trial and the general situation which surrounds the trial of every case. Judges, as a rule, are trained only in the law. In this case, it was for the jury to say which of the witnesses, if any, they would believe or disbelieve. *State v. Lightfoot*, 107 Iowa 344.

Though there was a conflict in the evidence at some points, the jury could have found from the evidence, among other facts appearing in the record, that the buildings and furniture were over-insured; the insurance was paid, part to Madden and part to Saling; that the burnings of the building of Saling in Creston, and that of Madden, and their contents, were of incendiary origin. The Madden property was situated in the town of Cromwell, about six miles distant from Creston. This building was not a large one. Defendant claims he was fitting it up as a hotel in order to trade it off. It was burned August 1st, about eleven o'clock at night. The second-hand furniture was placed in it a few days before the fire. The building had not been opened for business and had not the appearance of being occupied. Defendant purchased the furniture from his co-defendant, Saling. As to it, the claim of defendant is that he paid Saling \$50.00 in cash and secured the balance of the purchase price, \$400.00, by giving a mortgage to Saling. The policy of insurance was written making the loss, if any, payable to Saling. There was evidence that Saling said Madden had paid \$100.00 in cash and given a chattel mortgage for \$400.00. This furniture was taken by

wagon from Creston to Cromwell by persons hired by Saling; both Madden and Saling were present and assisted in placing the furniture in the Madden house. The jury could have found that, to an inquiry made of defendant Madden as to how the fire originated at Cromwell, he explained that his wife was cleaning a dress the evening of the fire, before she left Cromwell and returned to Creston, and that it might have originated in that way. Defendant was not then married to this lady, but did afterwards, and before the trial, marry her. She was assisting him arrange the furniture and, as they claim, in preparing the property for use. They were both witnesses, and on the stand did not make any claim that the fire originated in the manner stated by defendant. The record shows, and the jury could have so found, that Saling took an interest in the affairs of Madden in connection with the insuring of the building at Cromwell and getting the furniture into the building; that on at least two occasions while the property was being delivered in Cromwell, Saling and Madden drove together from Creston to Cromwell; it was unusual for Saling to deliver goods as far as six miles from his place of business; Saling furnished the information to the insurance agent upon which the policy on the furniture was written, and also reported the loss. During the day preceding the fire, Madden and the woman who afterwards became his wife spent the greater part of the afternoon at Cromwell in and about the hotel property. About 6:30 o'clock in the evening, this woman was seen carrying a can of oil from a near-by grocery to the Madden building. Shortly after this, she and Madden drove to Creston. About 7:30 to 8:00 o'clock that same evening, Madden hired a horse and buggy at the McFee Livery in Creston. About the time the fire was discovered, about 11:00 o'clock on the night of August 1st, a buggy was seen by a witness standing at the northwest corner of the park, which was near the Madden property, and, at the time the alarm of fire was given, the horse and buggy was driven away from there on a trot. According to

the testimony of a witness who was employed by the McFee Livery, the horse hired by Madden and driven away by him about 8:00 o'clock in the evening was returned between 11:30 and 12:00 o'clock that night by Saling. No explanation is offered by the defendant as to where he drove the horse taken from the McFee Livery on the night of the fire. Saling was not a witness in the case.

These circumstances, if true, and the jury could have so believed from the evidence, in connection with the actions of defendant and Saling relating to the insurance, the placing of the property in the building, and their actions soon before the Saling fire in Creston, when they were seen together, and just after that fire occurred, coupled with the testimony of Mrs. Gidley that she saw the defendant Madden running away from the Saling home at the time of the Saling fire, with the other circumstances in the case, tend strongly to show the guilt of the defendant of the crime charged. We shall refer to the testimony of Mrs. Gidley later. Going back to the Madden fire in Cromwell, a witness testified with reference to the nature of the fire as follows:

"I got home the night of the fire about ten o'clock. In going I passed by the Madden house on the west side. As I went home there was a dim light burning. I saw it shining out of the west windows. I was awakened that night by some one calling, 'Fire.' I got up and went down town. The Madden house was on fire. When I got down to the fire there was no one there. I went right to the south kitchen door. I looked through the window in the door. I think there was a glass in it. It was all full of stuff and the fire was burning all over it. It was all in that room. It seemed to be piled up in a heap in the center of the room, right back of the door. . . . There was no fire to be seen anywhere else in the house."

The jury may have believed from all the circumstances that defendant, instead of arranging the house, setting up

the furniture, as he and the woman claimed they were doing, were preparing the property for a fire by massing it in the one room.

In regard to the Saling fire in Creston and the conduct of the defendant Madden at that time, Mrs. Gidley testifies:

“When I went out on the porch I heard somebody running and naturally supposed they were running to the fire, and when they came in view they were running in the opposite direction, running east. It was Earl Madden and he went around his house and on to the porch. He went on the north side and around to the east and onto the east porch. He had a coat and hat on. It must have been pulled down over his head. I could not say how fast he could run, he was running east and on the south side of the street, and his home is located on the south side of the street, and on the same side of the street on which Mr. Saling’s home is located. In the center of the street is a big arc light. My porch is next to the arc light, to the east of the west sitting room and south of the parlor, and the arc light is in the center of Clarke and Walnut Streets. He went around north of his house and around on the east side and on the porch. I should judge from three to five minutes he came out. He didn’t have any coat on when he came out, and he was pulling up his sleeves. There was a gentleman there they call Everett Emerson, he was lying in the hammock and he spoke to him and they went down towards the fire. The two of them walked west down towards Mr. Saling’s fire.”

The defendant denies that he was at the Saling home before the fire alarm was sounded and claims that when he went down there he had on his coat and was fully dressed, but the city marshal saw Madden at the Saling fire and corroborates the testimony of Mrs. Gidley, in part, by stating that the defendant was in his shirt sleeves, and that his sleeves were rolled up. The burning of the Saling property in Creston occurred after the Madden fire. The court with-

drew from the consideration of the jury the question as to a third fire.

We have not set out all the evidence. There are many other circumstances in the record, some against the defendant, others in his favor. There was a dispute as to some of the circumstances we have enumerated, but, from the entire record, we are satisfied that it was a question for the jury to say whether the defendant is guilty.

We are of opinion that the verdict has sufficient support. Finding no reversible error, the judgment is—*Affirmed*.

LADD, C. J., EVANS and WEAVER, JJ., concur.

STATE OF IOWA, Appellee, v. OTTO VOCHOSKI et al., Appellants.

RAPE: Assault with Intent—Corroboration—Sufficiency. Evidence

1 reviewed and held to show sufficient corroboration to sustain conviction for assault with intent to commit rape.

RAPE. Evidence reviewed and held sufficient to sustain conviction
2 for assault with intent to commit rape.

RAPE: Complaint—Delay—Effect. Delay in making complaint of a
3 rape goes to its probative force under the surrounding circumstances, and not to its admissibility.

RAPE: Issues—Included Offenses. The evidence being sufficient
4 to sustain a conviction for rape, it was, under the evidence in instant case, proper to submit the included offense of assault with intent to commit rape.

RAPE: Issues—Included Offenses. The submission of included offenses, which might have been omitted, can seldom be prejudicial to defendant.

RAPE: Evidence—Corroboration—Province of Court and Jury
6 **Stated.** It is the province of the court to determine whether the record contains corroborating evidence,—the province of the jury to pass thereon. The court necessarily finds there is corroboration, in submitting the issues to the jury.

RAPE: Instructions—Prosecutrix's Story. An instruction in effect
7 requiring the state to sustain the entire story of prosecutrix
in order to justify a conviction was without prejudice to de-
fendant.

CRIMINAL LAW: Trial—Misconduct of Prosecutor—Sufficiency of
8 **Showing.** Misconduct of the prosecutor in argument must be
made to appear. The court will not presume it.

PRINCIPLE APPLIED: During argument, controversy arose
as to what the county attorney had in fact said to the jury.
The court made no finding as to what was said. The court stated
that he would state the law to the jury in his instructions. The
matter seems to have been overlooked. No effort to complete
the record for review was made. The counsel objecting did not
farther complain, except that in motion for new trial he farther
insisted on what he claimed the county attorney had said. *Held*,
the record presented nothing for review on the matter of mis-
conduct in argument.

Appeal from Jones District Court.—HON. F. O. ELLISON,
Judge.

SATURDAY, DECEMBER 19, 1914.

REHEARING DENIED TUESDAY, MAY 11, 1915.

PROSECUTION for rape. There was a verdict of guilty of
assault with intent to commit rape against both defendants.
Judgment was entered accordingly and sentence imposed.
Both defendants appeal.—*Affirmed.*

Jamison, Smyth & Hann and Clifford Paul, for appel-
lants.

George Cosson, Attorney General, and *George C. Gorman*,
County Attorney, for appellee.

EVANS, J.—Eliza Leslie, the prosecuting witness, testified
in part as follows:

“I live at Oxford Mills. I have lived there about three
years. Before coming to Oxford Mills I lived five miles west.

Lived on a farm with my folks. I was raised on a farm. I am sixteen years old. Am acquainted with Leon Carroll and Otto Vochoski. Have known Carroll ten years and Vochoski five. September 8, 1912, I was at Benhart's. Benharts live about four miles west of Oxford Mills. I had been there about three weeks. Had been working for Benharts off and on for three years. I didn't live at home with my father and mother. I lived at my brother's, Dick Leslie. When not working at Benharts I stayed with my brother."

Q. "Now, Miss Leslie, you may state whether or not you had a 'phone call from anyone on September 8th, Sunday. If so, state what there was to that."

A. "Mr. Carroll was the one that called me up. Mrs. Benhart answered the 'phone and he asked for me and I asked who it was, and he said Otto Vochoski, and I said 'Otto Vochoski,' I couldn't tell by the voice. He said 'You know who I am.' I thought it was Bert Jeffries. I didn't say anything in reply as to whether it was Jeffries or not. I am acquainted with Jeffries. We had the following conversation: He asked if I had company for that night, I told him no. He asked if he could come out. I said he could. It was about 7 o'clock. About a quarter to eight after that, Carroll came. He rapped at the door and the dog barked and he said 'Will the dog bite?' Mrs. Benhart said 'no,' so I went to the door. I said Mr. Jeffries called me up, and he said it was him that called me up, and he asked me to go buggy riding with him and I told him I would. Mr. and Mrs. Benhart were in the house at the time. We went to the buggy. I didn't put a hat on. He had a horse and buggy standing out in front of the house. We went through the entrance of the gate out to where the buggy was, got into the buggy and drove north about a half a mile. The road runs north and south past Benhart's place. Then turned around and came back past Benhart's house. No one came to the house with him at that time and no one went away with him. When we went past Benhart's house, we went on south. The road runs south and east of

Benhart's house about a quarter of a mile. We passed an orchard going south and there is a field on the other side. As you go south on the road it is down hill. There is a cut in the hill, the road is dug out and there is a hedge fence along the side of the road, orange orange hedge. When we got down to the bottom of the hill, there is a bridge there. There is no house near it. I went over described road with Carroll. When we came down to the bottom, most a half mile, there is a kind of a valley there and a bridge there. When we came down to the bridge Vochoski came out, one of the defendants in this suit. He came and said 'I have got you.' Mr. Carroll jumped out of the buggy and said 'what are you doing here' and struck at him. They stopped the horse, they did not fight, they struck at one another and smiled. Vochoski stepped into the buggy with me. He commenced saying he was going to tell my folks I was with Leon Carroll. I said I didn't care, I was going to tell them myself."

Q. "What did he do?"

A. "He pushed me over and took me around the neck with his arms and commenced to tell me I would have to let him have intercourse with me. Then I begged Carroll not to let Vochoski do it, and he said he wouldn't do it."

Q. "What did Carroll do, if anything?"

A. "He pushed me over and held my hands. Vochoski held one and Leon the other while Leon unpinned the cloth I had on. They took the cloth off, unpinned it. I could not move my hands. I hollered and cried."

A. "They told me to shut up or they would shut me up. Vochoski took hold and raised my clothes and Leon Carroll unbuttoned my clothes. Vochoski got onto me in the buggy and he had intercourse with me and he penetrated my person."

Q. "After he had done this, did Carroll do anything to you?"

A. "He did the same as Vochoski."

Both defendants were witnesses on the trial. The telephone call and the ride pursuant thereto were conceded by Carroll. He denied, however, that he gave any other name than his own in the telephone call. He also denied the alleged assault. The presence of Vochoski was denied by both defendants.

At the close of the State's evidence, there was a motion by the defendant Vochoski for a directed verdict on the grounds that the evidence was insufficient to connect him with the alleged offense and because there was no corroborating evidence. This motion was not renewed at the close of all the evidence. However, the same contention is urged on this appeal. It is first urged for the defendant Vochoski that there was no corroborating evidence as to him.

There was evidence other than that of the prosecutrix which, if believed by the jury, would establish the following facts: That Carroll called on the prosecutrix with horse and buggy at about 7:45; that this was pursuant to the telephone call at about seven o'clock; that Vochoski was with Carroll at the time of the telephone call and heard what he said; that the telephone call purported to be in the name of Vochoski; that Vochoski and Carroll were riding together in Carroll's buggy shortly before Carroll started for the Benhart home; that Carroll left the prosecutrix at the Benhart home about 10:00 P. M.; that Vochoski and Carroll were together at the neighboring village four miles distant at 11:00 P. M. and that they rode home together in the same buggy; that prior to the assault and on the same afternoon or evening, Vochoski told witness Engle that he had a "date" for that evening with the prosecutrix; that after the event and after his arrest therefor, he made statements admitting his presence at the place of the alleged assault. That the foregoing was sufficient to go to the jury on the question of corroboration is too clear for discussion.

II. It is urged for both defendants that the testimony was

insufficient to convict. The argument is that the story told by the prosecuting witness is too improbable, if not impossible, to be credible. The story is a revolting one.

2. **RAPÉ.**

In a sense, a revolting crime is always incredible, especially to those who would be morally incapable of it themselves. In that sense only is the story of the prosecutrix necessarily incredible. Of course, it should be scrutinized with searching care and the jury was so instructed. But the revolting character of the crime must not be permitted of itself to operate as an impeachment of the story of the injured party. The story of the prosecutrix is full of consistent details which would not lend themselves readily to a complete fabrication. A few evenings prior to the night in question, Vochoski had taken the prosecutrix out buggy riding and had attempted indecent liberties with her, because of which she left his buggy. Carroll had not previously kept company with her and does not appear to have taken her out riding before. It being once found that Vochoski was at the place of the alleged assault by previous understanding with Carroll, such fact would naturally give rise to very unfavorable inferences quite consistent with the story of the prosecutrix.

III. The prosecutrix was sixteen years old and was a domestic in the Benhart family. The alleged offense was committed on Sunday evening. When she returned home, the family had retired. She did not, on the

3. **RAPÉ: com-
plaint: delay:
effect.**

following day, make any complaint to the Benharts. She did appear to be in distress and was observed to be crying. On Tuesday, she went to the home of her brother, five miles distant, and made the complaint to her sister-in-law. In such complaint she accused the defendants of having ravished her. Such complaint was put in evidence. It is contended for the defendants that it was improperly received because of its delay and because it was merely hearsay and especially so as to the naming of the defendants therein. The complaint was clearly admissible, notwithstanding the lapse of time before it was made. The

delay was subject to explanation and went only to the credibility and weight of the evidence. The entire question is covered by our previous cases. *State v. Dudley*, 147 Iowa 645; *State v. Peterson*, 110 Iowa 647; *State v. McGhuey*, 153 Iowa 308.

IV. In submitting the case to the jury, the trial court submitted to the consideration of the jury all the included offenses, viz.: assault with intent to commit rape, assault and battery, simple assault. The verdict was for assault with intent to commit rape. It is urged first that there is no basis in the evidence for this verdict and that, under the evidence of the prosecutrix, the defendants were guilty of rape or were not guilty at all. As the evidence was sufficient to prove rape, it was necessarily sufficient to prove the assault and the intent to commit. That the jury may have had a reasonable doubt as to whether the rape was actually accomplished under the circumstances shown, and yet have had no reasonable doubt that there was an intent and attempt to accomplish it, involves no necessary inconsistency. This is rendered plain by perusal of appellants' argument on the proposition that the commission of the crime of rape under the circumstances shown was a practical impossibility.

It is further urged that the trial court erred in submitting the included offenses, because the defendants could not have been guilty of any included offenses unless they were guilty of the higher offense of rape accomplished.

5. RAPE: issues: included offenses. Many of our previous cases are cited in the brief, but they are all cases wherein reversal was sought because of failure of the court to submit the included offenses. It is frequently the right of the defendant to have the included offenses submitted. To submit included offenses when they might have been properly omitted can seldom be prejudicial to a defendant. Under the record in the case at bar, the evidence would sustain a verdict for any one of the included offenses submitted. It clearly sustains the

verdict rendered. That still lower included offenses were submitted to the jury could work no prejudice to the defendants.

V. Complaint is urged that the trial court required the jury to determine whether there was any corroborative evidence to connect the defendants with the offense. It is argued

6. RAPE: evidence: corroboration: province of court and jury stated. that it is the duty of the court and not the jury to determine whether there was any corroborative evidence. The particular instruction, number eight, thus complained of is long

and quite stereotyped in form. The argument is based upon isolated phrases separated from the context. It is true that it was the duty of the court to determine whether there was any corroborative evidence to connect the defendants with the offense. If nay, it was the duty of the court to direct a verdict for the defendants. In overruling the motion for a directed verdict and in submitting the case to the jury, the trial court necessarily found that there was sufficient corroborative evidence to go to the jury. Such corroborating evidence has already been recited herein and we hold it sufficient. The weight and the credibility of the evidence were for the jury. If the jury had discredited this testimony, there would have been no corroboration. If, therefore, the trial court had erroneously instructed the jury as to whether there was any corroborating evidence, it would be prejudicial to the prosecution and not to the defendant. The only mistake the jury could make at that point would be to find in the negative. Taking the instruction as a whole, it is not fairly subject to the criticism made upon it, although it might have laid the question before the jury more concisely.

VI. In instruction number seven, the following language was used: "and from all the facts and circumstances given in evidence determine the probability or improbability of her

7. RAPE: instructions: prosecution's story. story and whether the defendants or either of them did in fact ravish her as charged."

Complaint is directed to the use of the words "her story." It is argued that the question was the prob-

ability or the improbability of the guilt of the defendants and not the probability or the improbability of "her story." We see no ground for complaint here. Unless the jury were to find the story of the prosecutrix materially true, the defendants could not have been found guilty. Neither could they have been acquitted without a rejection of the story of the prosecutrix as being incredible, improbable, or too doubtful. If there was error in using the words complained of, it was that it laid upon the State the burden of sustaining the entire story of the prosecutrix in order to obtain conviction, whereas theoretically her story might have been rejected in part and accepted in part and the accepted part, with the other testimony, might have been sufficient to warrant the conviction. The only possible error, therefore, in the use of these words was that an undue burden was laid upon the State.

VII. Complaint is made of the conduct of the county attorney in the argument of the case to the jury. The record on the question is quite incomplete. In the course of the argument, the counsel for defendants objected to the argument of the county attorney and stated to the court what the county attorney had said. Whether it was said in the presence or absence of the judge does not appear. Counsel for the defendants noted an exception to such alleged statement of the county attorney in argument to the jury. The county attorney denied the statement of defendants' attorney as to what he had said. He also purported to recite what he did say. No finding was made by the court as to what was actually said by the county attorney to the jury. No exception was taken by defendants' attorney to any other statement of the county attorney than the one recited by himself. If the denial of the county attorney were found to be correct and if the only statement he made was the one recited by himself to the court, no exception was preserved to the statement in that form. The parties being in dispute as to what was said, the trial court disposed of it as follows: "The Court:

8. CRIMINAL
LAW: miscon-
duct of prose-
cutor: sum-
mency of
showing.

'I can explain all these things and matters when I come to give the instructions.

" 'Gentlemen of the Jury: I will give you the law governing the same when I come to give my instructions. That is all the law in this case.' "

To this statement of the court the attorney for defendants acquiesced without exception. No further reference was made to the subject either in the instructions or otherwise. That the subject was entirely overlooked in the instructions was known to the counsel before the jury went out. No effort appears to have been made either to bring it again to the attention of the court or to note an exception to the failure of the court to complete the record for the purpose of review. The question was likewise raised in the motion for a new trial. But such ground of new trial was based exclusively upon defendants' contention of what the county attorney had said. There was at no time a finding by the trial court or agreement of counsel as to what was said. We think, therefore, that there is nothing before us at this point which we can properly consider. The foregoing comprise the principal questions presented for our consideration. We find no error in the record and nothing to indicate that the defendants did not obtain a fair trial.

The judgment below must therefore be—*Affirmed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

ISAAC BICE et al., Appellants, v. LORENZO SIVER et al.,
Appellees.

COMPROMISE AND SETTLEMENT: Consideration—Payment in
1 Advance—Unliquidated Claims. The payment of a liquidated claim (rent notes) before maturity may be a sufficient consideration for the satisfaction of unliquidated claims pending between the parties.

COMPROMISE AND SETTLEMENT: Facts Showing—Evidence Re-
2 **viewed.** Evidence reviewed and held insufficient to establish,
prima facie, a compromise settlement.

CONTRACTS: Nonperformance—Difficulty Attending Performance—
3 **Excuse.** Inconvenience and difficulty attending the performance
of the terms of a contract is no excuse for nonperformance.

AUCTIONS AND AUCTIONEERS: Warranty—No Implied Author-
4 **ity to Make.** An auctioneer has no *implied* authority to warrant
property sold by him.

EVIDENCE: "Parol Evidence" Rule—Contracts Partly Written,
5 **Partly Oral—When Oral Part Provable.** A contract may be partly
in writing and partly in parol. If the parol part is concerning
a matter not covered by the writing, then, the written and parol
parts being harmonious, the parol part may be shown along with
the written.

PRINCIPLE APPLIED: A landlord and tenant, early in the
fall of the year, entered into an oral lease for the year follow-
ing. In January, following the oral lease, a written lease was
executed. *Held*, the written lease did not prevent the tenant
from showing that by the terms of the oral lease he was to have
the right to do certain plowing during the fall preceding the
execution of the written lease.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

THURSDAY, MAY 13, 1915.

ACTION to recover damages consequent on breaches of a
farm lease. A counterclaim was filed and on trial a verdict
returned for defendant. From judgment entered thereon
plaintiffs appeal.—*Reversed*.

A. W. Fisher and Voris & Haas, for appellants.

Chas. W. Kepler & Son, for appellees.

LADD, J.—Plaintiffs owned 240 acres of land, and, on
January 24, 1912, executed a lease thereof to the defendant
from January 1, 1912, to March 1, 1913. By the terms of
this lease, the tenant was to pay a rental of \$960.00 and all

damages the lessor might sustain owing to any failure to perform its conditions. The lease required the defendant to haul out and spread on the land all the manure thereon or which might accumulate during the term, and it is alleged in the petition that the defendant failed to do this, to plaintiffs' damage in the sum of \$75.00; that he misappropriated 1,334 feet of lumber of the value of \$49.27; that he cut, moved and destroyed fences to replace which plaintiffs were put to an expense of \$72.04; that he permitted to go to seed and spread Canada thistles on the land, to their damage in the sum of \$50.00; and that he misappropriated four hinges, broke out window lights, carried away linoleum and removed a kettle, to their damage in the sum of \$16.40. The answer pleaded a settlement, and in the counterclaim, defendant asked to be allowed \$137.50 damages on breach of warranty in the sale of hay, and \$20.00 owing to the refusal of plaintiffs to permit the defendant to plow in the fall on the place as agreed.

I. The evidence disclosed that, but for the plea of settle-

1. COMPROMISE
AND SETTLE-
MENT: con-
sideration:
payment in ad-
vance: un-
liquidated
claims.

ment, plaintiffs were entitled to recover for failure to haul out the manure. On the other hand, if there was a sufficient showing of settlement to carry the issue to the jury, error in any other rulings must have been without

prejudice. At the outset then, it is important to inquire into the sufficiency of the evidence bearing on this issue. One-half the rent was payable January 1, 1913, and the other half on

2. COMPROMISE
AND SETTLE-
MENT: facts
showing: evi-
dence re-
viewed.

March 1st following. In December previous, the defendant met plaintiff Isaac Bice at Walker, and talked with him a couple of hours at the bank. "We talked," says de-

fendant Siver, "about the manure I hadn't got out and about all the different things I thought he would make me trouble over; I told him I had trouble on the land, couldn't get on to some sixty acres, and about the spoiled hay, that there were two or three feet of spoiled hay in the barn that I had to

feed to my cattle. I called plaintiff's attention to the hay when I found it was spoiled. I settled with him in Walker in December, 1912. I asked him to throw off two tons of hay, he wouldn't do it; then I asked him to throw off one ton and he wouldn't do it. He said if I would pay the rent he would be satisfied. I paid him \$12.00 per ton for the hay, I told him I hadn't got the manure out, that I wasn't to go on to it in the fall and I didn't think that he ought to compel me to haul out what he had stocked up for years. He didn't say that he would do anything if I paid my notes, one of the rent notes was not due until March 1st. I asked him if he would take all the money, and he said, 'all right,' and I told the banker to draw up a check for the full amount and deduct the interest, and then there was something said by me about some guide wires that I put up at the corn crib."

On cross-examination he testified that, when he paid the notes, he paid them in full, less discount for the unexpired time on the last note maturing. "I wanted him to throw off \$1.25 an acre for the land not plowed. He objected to it. There was something said about the manure. I told him how much I had hauled and how much I thought there was in there. I didn't want to do anything about the manure then."

The brother of the defendant testified as follows: "I was present when the defendant had a settlement with Mr. Bice at Walker on the 23rd of February, 1912. Was in the bank, my boy, myself and the defendant, and Mr. Hawkinson, the banker, was there. I talked some with Mr. Bice about the manure myself. He said he knew it was impossible to get that manure out in the fall the way the weather was. They had some talk about the hay. The defendant asked him to throw off on the hay and I heard him say that if he would throw off a ton or a couple of ton that it was going to be pretty hard to raise the rent that he had to pay. My brother spoke to him about the fall pasture and the condition of the

fences. After the defendant paid the rent, Bice said, 'It is settled up.' Q. What did he say after that? A. He said him and Lon was going to settle up and there would be no trouble. . . . Q. There wasn't anything said about manure? A. I didn't hear my brother say anything about manure that day."

Hawkinson testified that he was the cashier of the bank and heard a part of the conversation. That he heard them talking about throwing off \$1.00 an acre for the land not plowed, and some talk about hauling manure or failing to haul and other matters.

The appellant argues: first, that there was no consideration for any settlement; and second, that no agreement to settle the matters in dispute was made by the parties. The rent note was paid before maturity and, even though a discount was allowed, defendant was under no obligation to pay until it should become due. Of course, the discount was a consideration, but there may have been a consideration in addition to this, and if, as defendant contends, such additional consideration was the payment of the rent notes before maturity, then this would be ample to support the satisfaction of the unliquidated claims held by plaintiffs against defendant. A more difficult question to be determined is whether the parties entered into an agreement of accord and satisfaction. If so, this must be inferred from the language employed rather than from express words having such import. Undoubtedly they were discussing all matters now in controversy, but the most said from which an agreement could be inferred was by Bice, that he was satisfied. With what was he satisfied? The fair inference is that he was satisfied to allow the discount and receive the rent then instead of later. No offer of compromise had been made save by defendant, in attempting to procure an allowance of some of his claims, which Bice refused. There was no discussion as to whether plaintiffs would waive their claim to damages because of the omission

to haul out the manure, or to the other items involved in this suit, and we are inclined to the opinion that there was not sufficient evidence to carry the issue to the jury.

II. All the items on which plaintiffs made claim were in dispute save that for failure to haul out manure. The evidence showed without controversy that the defendant had

3. **CONTRACTS:**
non-performance: difficulty attending performance: excuse.
failed to haul out 200 loads of manure which he had expressly agreed to haul and spread upon the premises. The circumstance that hauling it out in the fall was interfered with in some way, or that he may have gotten his wagon in the slough at one time did not excuse him from performing the conditions of the lease, and plaintiff was entitled to recover at least \$75.00 because of the breach of the contract in failing to haul out and spread the manure upon the land.

III. Plaintiffs had been occupying the farm and, before yielding possession to defendant, had an auction sale, at which the latter purchased 11 tons of hay at \$12.50 per ton. It

4. **AUCTIONS AND AUCTIONEERS:**
warranty: no implied authority to make.
was in the hay mow and the evidence tended to show that the auctioneer in offering it for sale stated that it was nice, bright hay, though in fact the bottom 5 tons were musty and half of it rotten. The hay could not be examined save on the surface, and though this statement was an expression of opinion, it is not questioned that, in the circumstances disclosed, the issue as to whether what was said constituted a warranty was rightly left to the jury. See *Powell v. Chittick*, 89 Iowa 513; *McDonald Mfg. Co. v. Thomas*, 53 Iowa 558; *McGrew v. Forsythe*, 31 Iowa 179.

But there was no evidence whatever of the auctioneer's authority to make such a statement. Until property is struck off to the highest bidder, he is primarily the agent of the seller (*McGrew v. Forsythe*, 31 Iowa 179), but may not bind his principal, the seller, without special authority so to do. *Monte Allegre*, 9 Wheaton 616, 6 L. Ed. 175; *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. 247; *Upton v. Suffolk Co.*

Mills, 11 Cushing (Mass.) 586, 589; *Boyce v. Palmer*, 75 N. W. (Nebr.) 849.

As there was no evidence to show authority, we need not inquire what evidence would be sufficient to establish authority on the part of an auctioneer to warrant. The court was in error in submitting this issue to the jury.

One of the items of damage claimed by defendant is based on plaintiffs' refusal to permit him to fall plow the land. It seems that the parties orally arranged early in the fall for the leasing of the premises the following year, and the evidence in behalf of the defendant tended to show that it was agreed mutually that defendant should fall plow some of the land. It farther tends to show that he went to the premises with six horses and a gang plow for the purpose of so doing, and that plaintiffs refused to permit him so to do, and that he suffered damages because of this breach of the oral agreement. The plaintiff objected to the introduction of this evidence, for that a written lease was executed in January, 1912, and, as is said, all previous negotiations were merged therein. It is quite well established, however, that a contract may rest partly in parol and partly in writing.

It was competent for the parties to enter into an oral agreement to lease for a term not exceeding one year, and according to the evidence they so did, but subsequently entered into a written agreement concerning all matters involved except that which must have been previously carried out, and we think it is purely a case of a contract partly in parol and partly in writing. *Fudge v. Kelly*, decided at present term. The authorities seem quite generally to support this conclusion. Because of the errors pointed out, the judgment is—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

THE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT OF WEBSTER AND JEFFERSON TOWNSHIPS et al., Appellees, v. P. H. MARTIN, as County Treasurer, Appellant.

SCHOOLS AND SCHOOL DISTRICTS: Election—Notice—Comput-

- 1 **ing Time.** The general rule for computing time is to exclude the first day and include the last. (Sec. 48, Par. 23, Code.) Therefore, notice of a school election under Sec. 2746, Code, posted on March 18th for an election on March 28th, was sufficient, said statute requiring posting "for not less than ten days preceding the day of the meeting."

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Petition—

- 2 **Sufficiency.** If a petition for a consolidated school district requires the signed approval of the county superintendent to be affixed *after* being signed by the electors, such approval was sufficient in instant case where the superintendent had affixed his approval both before and after signing by the electors. (Sec. 2794-a, Sup. Code, 1913.)

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Petition—As-

- 3 **sumed Location of Schoolhouse—Effect.** A petition for a consolidated school district (Sec. 2794-a, Sup. Code, 1913) is not rendered defective because it called for a certain specified location of the schoolhouse. Such a clause is neither required nor prohibited.

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Election—

- 4 **Separate Vote in Villages.** A village ordinarily is a collection or group of houses. A 60 and an 80-acre platted tract on which were located three and five widely separated houses, respectively, and a small store and a blacksmith shop, located at the junction of a public highway with an interurban railway, do not constitute "villages" within the meaning of Sec. 2794-a, Sup. Code, 1913, requiring separate voting in "villages" on the question of establishing a consolidated school district, nor within the meaning of Sec. 638 of the Code, providing that "town sites platted and unincorporated shall be known as villages."

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Size of Re-
5 **maining Corporation—Prohibition.** In the formation of a con-

solidated independent school district, territory must not be so subtracted from a school corporation as to leave the corporation with less than four suitable, contiguous government sections (Sec. 2794-a, Sup. Code, 1913); yet this applies to the size of the corporation, not to the size of a part of the corporation,—for instance, not to the size of a subdistrict of a school district township.

Appeal from Polk District Court.—HON. W. S. AYRES, Judge.

THURSDAY, MAY 13, 1915.

ACTION of mandamus brought to compel the defendant as county treasurer to pay over to the treasurer of the plaintiff corporation the amount of certain taxes collected by the defendant on behalf of the plaintiff. The defendant challenges the legality of the organization of the plaintiff corporation. No other defense is presented. The trial court awarded decree and order as prayed by the plaintiffs and the defendant has appealed.—*Affirmed.*

Guy A. Miller, for appellant.

Stipp, Perry & Starzinger, for appellees.

EVANS, J.—The plaintiff corporation purports to be a consolidated independent school district organized about one year ago under the provisions of Sec. 2794-a of the Code. The defendant's challenge of illegality in the organization is based upon four specifications which we will consider in order.

I. It is first claimed that the notice of election, wherein the consolidated district was voted, was insufficient and therefore illegal, in that such notice of election was not posted

“for not less than ten days *next preceding* the day of the meeting.” The notices were posted on March 18th. The election was called to meet on March 28th and was held on such date. It is urged that this was only nine days “next preceding the day of the meeting.” Our statute provides that in computing time the first day shall be excluded and the last day included. Code Sec. 48, sub-section 23. Under this rule, the notice given should be deemed a ten days' notice.

1. SCHOOLS AND
SCHOOL DISTRICTS: election: notice: computing time.

It is urged, however, that the statute under consideration (Sec. 2746) required that the ten days' notice be given "preceding" the day of the meeting. Of course, all notice must *precede* the event; otherwise it is not notice at all. The emphasis of the statute at this point is not upon the word "preceding" but upon the words "next preceding." In other words, the period of notice must extend up to the day of the meeting. Compliance with this provision serves to bring the meeting to the attention of the voter at the very time that he is called upon to vote. For instance, a posting of notices for a period of ten days some months previous to the date of the election would not be a compliance with this requirement. We are clear that the computation of time at this point is governed by Code Sec. 48, as above stated. To the same effect, see the following cases: *Bonney v. Cocke*, (1883) 61 Iowa 303; *Church v. Lacy & Co.*, (1897) 102 Iowa 235; *Hannah v. Green*, (1904) 143 Cal. 19, 76 Pac. 708; *Cosgriff v. Election Commissioners*, (1907) 151 Cal. 407, 91 Pac. 98; *Stroud v. Consumers' Water Co.*, (1894) 56 N. J. L. 422, 28 Atl. 578; *Omaha Water Co. v. Schamel*, (1906) 147 Fed. 502, 78 C. C. A. 68; *McGinn v. State*, (1895) 46 Neb. 427, 65 N. W. 46, 50 Am. St. 617, 30 L. R. A. 450; *White v. German Ins. Co.*, (1884) 15 Neb. 660, 20 N. W. 30; *State ex rel. Lewis v. Eggleston*, 34 Kans. 714, 10 Pac. 3; *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. 621; *Brady v. Moulton*, 61 Minn. 185, 63 N. W. 489; *King v. State*, 33 Tex. Crim. Rep. 547, 28 S. W. 201; *Winston v. State*, 32 Tex. Crim. Rep. 59, 22 S. W. 138; *State ex rel. Weber v. Tucker*, 32 Mo. App. 620; *Leonard v. Saline Ct.*, 32 Mo. App. 633.

The defendant relies on *Robinson v. Foster*, 12 Iowa 186, as holding a different rule. The case, however, is not applicable. It relates to the time of service of an original notice. The method of computing the time of service of an original notice is governed by Code Sec. 3517 and requires the exclusion of both the first and the last day in such computation. The cases, therefore, which relate to original notices are without application to the case at bar.

II. It is urged by defendant that the petition upon which the consolidation was effected was defective and therefore void. This contention is based upon two specifications: (1)

2. SCHOOLS AND
SCHOOL DIS-
TRICTS: CON-
solidation:
petition:
sufficiency.

That the petition was signed and approved by the county superintendent *before* it was signed by the voters; and (2) because such petition recited a condition which was intended as an inducement to the voter and which was beyond the contemplation of the statute and was not permitted by the statute.

As to the first specification, it is the contention that the petition should have been approved and signed by the county superintendent after it was signed by the voters and not before. It is enough to say here that such petition was approved and signed by the county superintendent both before and after it was signed by the petitioners. This was a clear compliance with the statute.

The second specification relates to a proviso in the petition which called for the location of the proposed schoolhouse at or near Johnston Station. This location appears to have

3. SCHOOLS AND
SCHOOL DIS-
TRICTS: CON-
solidation:
petition: as-
sumed location
of school-
house: effect.

been deemed by the petitioners as the most suitable location for the convenience of the inhabitants of the district. Its inclusion in the petition was not required by the statute.

Nor do we find any provision of the statute which was in any way violated by its inclusion in such petition. Whether it could have any binding effect upon the district is a question which is not involved.

III. It is next urged that the consolidated district as proposed and voted included several villages and that no provision was made for separate voting in such villages. The ter-

4. SCHOOLS AND
SCHOOL DIS-
TRICTS: CON-
solidation:
election:
separate vote
in villages.

ritory involved is rural territory adjacent to the city of Des Moines. It is penetrated by an interurban railway running from Des Moines to Perry. It does not appear that there is any group or collection of houses within said territory. Within the ordinary definition, there-

fore, there was no village involved. It does appear that some owners of farms had platted considerable tracts of land into acre lots with a view, doubtless, of selling the same in the future to prospective inhabitants. Reliance at this point is had upon Sec. 638 of the Code, which contains the following:

“Town sites platted and unincorporated shall be known as villages.”

One of the tracts thus subdivided was known as “Johnston’s Acres” and included sixty acres. Upon this sixty-acre tract three houses stood, widely separated. Another tract of eighty acres thus subdivided was known as “Johnston’s Acres No. 2.” Upon this tract there were five houses, widely separated. Johnston Station consisted of an intersection of the interurban railway with the highway and was a stopping place for the interurban trains for the purpose of unloading and receiving passengers. Near by was a blacksmith’s shop and a little store. It does not appear that there were any residences. It is perhaps enough to say that these localities were not “town sites.” They were not platted as such by the owners nor held forth as such by anyone. We do not think they were “villages” within the contemplation of Sec. 2794-a.

IV. Lastly it is urged that by the formation of the new consolidated district certain subdistricts were reduced in their territory to less than four sections. That is to say, the new district included territory of a certain district township. Two of the subdistricts of such township were left with insufficient territory as alleged. The statute in question provides as follows:

5. SCHOOLS AND
SCHOOL DIS-
TRICTS: con-
solidation:
size of re-
maining cor-
poration:
prohibition.

“No school corporation from which territory is taken to form such a consolidated independent corporation shall, after the change, contain less than four government sections, which territory shall be contiguous and so situated as to form a suitable corporation.”

A subdistrict of a school district township is not a "school corporation." The subdistricts in question, therefore, are not covered by the inhibition of the statute. The situation doubtless calls for a rearrangement of the remaining subdistricts, and this is within the power of the appropriate officials of the district township.

We reach the conclusion, therefore, that none of the specifications of illegality made by the defendant can be sustained. The order of the district court is therefore—*Affirmed.*

DEEMER, C. J., PRESTON and WEAVER, JJ., concur.

STATE OF IOWA, Appellee, v. JOE ROBINSON, Appellant.

CRIMINAL LAW: Other Offenses—Admissibility—Rape. Evidence

- 1 of offenses other and different than the specific one charged in the indictment, and each a complete offense in itself, is admissible on the question of *quo animo*, even though such offenses were not directly committed by the accused, and though subsequent in point of time to the offense charged, when in view of time, place, and circumstances the offense charged and such other offenses are so interwoven that they all constitute one criminal transaction.

CRIMINAL LAW: Trial—Argument—Misconduct—Inflammatory

- 2 **Appeals—New Trial.** The law does not shackle a public prosecutor with a handicap in the way of a hard and fast rule as to just what he may and just what he may not say in argument. But however repulsive the crime may be, however self-evident the guilt of the accused may appear, the public prosecutor should always remember that to keep within the record and fair and reasonable deductions therefrom is the high ideal of the law and his proudest boast. Aside from this high ideal of the law, he should remember that assertions during argument that he or someone else would have been justified in taking the law into his own hands and killing the accused (or words to that effect) are regarded as highly inflammatory and are very destructive to the stability of a verdict of guilt. In the instant case, a new trial was ordered, because of inflammatory remarks, in spite of the admonition of the trial court to the jury not to consider the same.

RAPE: Corroboration—On What Phase of Case Necessary. Corroboration is only necessary in so far as it is necessary to connect the defendant with the commission of the offense. The commission of the crime may be proven by the testimony of the prosecuting witness.

RAPE: Force and Resistance—Mental and Physical Strength of Parties—Instructions. It was proper, in instant case, to instruct: "You are instructed that the force necessary, on the one hand, to commit the crime of rape, and the resistance required, on the other hand, to constitute the crime, depend upon the relative mental and physical strength of the parties, and the circumstances surrounding them at the time of the alleged assault," even though there was no record evidence of the physical and mental strength of the parties, both, however, being before the jury.

CRIMINAL LAW: Flight in Absence of Accusation—Effect of—Instructions. In instant case, the effect of flight, if the jury found any, on the part of accused, was properly left to the jury, even though at the time of leaving accused had not been charged with the offense.

Appeal from Lyon District Court.—HON. WM. HUTCHINSON,
Judge.

THURSDAY, MAY 13, '1915.

APPEAL from a judgment of conviction for the crime of rape.—*Reversed.*

E. C. Roach and *D. H. Sullivan*, for appellant.

George Cosson, Attorney General, for the State.

GAYNOR, J.—Defendant in this case was charged and convicted of the crime of rape committed upon one Bena Runge on or about the 10th day of May, 1913, in the City of Rock Rapids, County of Lyon. From the conviction, he appeals to this court.

The first error assigned relates to the action of the court in permitting the prosecuting witness to testify that other parties, on the same night and about the same time, assaulted her and had sexual intercourse with her.

The defendant admits that he had sexual intercourse with the prosecuting witness at the time, but claims that this was with her consent. He claims that he had intercourse with her twice on this day, once at the dump grounds during the afternoon, and once near the German Church in the evening. She, however, claims that there was but one act of sexual intercourse between her and the defendant, and this was in the evening, somewhere up town, the exact place she is not able definitely to fix. She says: "It was after we got across the railroad bridge. I do not know how far we went, and did not know where we were. After we got out across the railroad bridge, he threw me down and had connection with me. I cried and started to holler, and he never paid any attention to that. I kicked and tried to pull away so as to keep him away from me, but I could not do so. After that, he let me walk along again and Creglow came along and did the same thing. I scratched and tried to holler, and they never paid any attention to what I said, and then Creglow left and Robinson, the defendant took me along with him to the Fairgrounds. Then he took me in the barn at the Fairgrounds and here made me sit down on the bed. When I got to this barn there were seven men there. The room by the barn was quite a small one, and had a bed in it."

Thereupon, the following testimony was admitted over the objection of the defendant:

Q. And then what was done? Robinson was there, was he? A. Yes, sir. Q. And then what was done, Bena? What did they do to you then, if anything? A. And then they all went out, all but Slim. Q. Slim? A. Yes, and he stayed in there. And then he had connection with me. Q. Well, what did you do when he tried to have connection with you? A. Scratched and hollered. Q. And then what happened after that? A. Then he left the room and another one came in. Q. And what did he do? A. He tried the same thing. Q. And what did he do? A. He left the room with-

out. Q. He left the room without? A. Yes, sir. Q. You kept him from it, did you? A. Yes, sir. Q. Did anybody else come in? A. Yes, sir. Q. Do you know who that was? A. Frank. Q. That is all you know? A. Yes, sir. Q. A fellow by the name of Frank? A. Yes, sir. Q. And what did he do, if anything? A. He did the same thing as Slim did.

And then they all went out and I stayed there and then they all came back together and sat down. I think when they came back there were nine of them altogether, including Creglow and Robinson. And then they all talked together and two others came to the door and then two of them went out and they talked to those people on the outside and then they came in, too. Then Robinson and Jack Creglow took me out and Slim came afterwards. Robinson and Creglow took me away from the barn. Joe Robinson said that if I would tell anything about this he would find it out and kill me. This was said at the barn and I was scared. Do not know how long I was in the barn but it seemed a long while to me. After we left the barn Robinson and Creglow took me to the end of the fairgrounds. They both took a hold of me and kept a hold of me until we got to the gate of the Fairgrounds. Then Slim came and Creglow let go of me and Slim took a hold of me the same way that he did. I had never seen or heard of Slim before that night. After Slim took a hold of me, they took me to the wagon bridge, one on either side of me. When we got to the bridge, Robinson let go of me and Slim led me along. This all occurred at Rock Rapids in Lyon County, Iowa.

Q. What did Slim do with you, Bena? A. Led me into the house. After Robinson left, Slim led me to a house. Q. Now, I want to ask you whether or not Robinson came to that house at all, that you know of? A. No, sir.

She further testified that she did not see Creglow after he had intercourse with her until she saw him down in the room at the Fairgrounds.

She further testified that Slim was a large man; that she had no acquaintance with him prior to this meeting; that when Slim took her into the house, the location of which she is unable to state, he made her undress and made her get into bed. He put the light out. Then he came into the bed. She says she tried to get out, but he kept her there. When she attempted to get out, he made her lie down. She did not sleep any during that night; that he had sexual connection with her; that she tried to prevent him from doing so; that in the morning, Slim telephoned for a team; that the telephone was in a room other than the bedroom; that he locked her in the bedroom when he telephoned; that a team afterwards came; that Slim took her out and made her get into the buggy; that there was a man called Thomas in the buggy at the time; that Slim gave her a dollar about the time she started away; that he said nothing about money before that time. Slim was about twenty-seven or twenty-eight years old. This man Thomas took her away from the house to a wagon bridge, then made her get out. After she got out of the buggy, she went to get breakfast.

Defendant, testifying for himself touching the act of intercourse, said: "The place where I had connection with her in the evening was at the east side of the German Church. I had connection with her there once, but did not use any force. She was willing and consented to it. After that, I met some boys that I knew and talked with them. They asked who the girl was. I told them a lady friend of mine." He testified that when he got through with the boys he went over across the railroad track and turned north and went by the side of the factory until he got to the Rock Island tracks, and when he got as far as the depot, they met Creglow. While we were standing there, she said she thought she saw Mrs. Hamlin coming. "We went over to the Holliday machine shed. I stood there, she and Creglow did not stop, but kept on over to the shed. I stood there to see who those people were. While I was standing there Bena and Creglow came back. Then we

separated from Creglow." He then describes their route until they reached the Fairgrounds, about eight or nine o'clock. When they got there, they met Jack Creglow again. Thereafter, he details the meeting of certain parties and conversations between the prosecuting witness and himself and the others, about six in all, but denies that anyone had sexual intercourse with her at the Fairgrounds. After they had been in there awhile, he and Creglow went over to the well to get a drink and left the other parties there. They were gone fifteen or twenty minutes. The same crowd was in the room when they got back. Bena was sitting on the bed. When they got back, they stayed there about twenty minutes. Heard nothing about any abuse of Bena. They offered to take her to Hamlin's or to the preacher's where she had resided before. She said she wouldn't go. "Then we told her we would get her a room at the hotel, but she didn't want to go there. After we started to leave the Fairgrounds, Slim overtook us. After Bena said she didn't want to go up town, Slim said she could go and stay with him and she said, yes, that she would go with him, and then Slim and Bena started south." Defendant says he accompanied them as far as the gate, but did not go to Slim's house; that immediately after Slim and Bena left, Creglow and he went up town. This was about 10:00 o'clock at night.

Creglow testified: "I saw the prosecuting witness at the Fairgrounds that night with the defendant. I was in the habit of going down there quite frequently. We met these other men half way between the training barn and the west entrance, and we talked with them I should say five or ten minutes. Slim, or one of the parties, suggested going back to the barn, and we started back to the barn. When we got back to the barn, one of the parties opened the barn and we went in. Then we opened the office door and went to the office. This office contained a bed, chair, stove and table. While we were in there, we talked generally, Bena sitting on the bed. Nobody said anything improper or indecent to her,

and she was not assaulted. She appeared in good spirits and cheerful. Defendant and I stayed at the well twenty-five or thirty minutes getting a drink. When we returned, the same crowd was present. Bena was sitting on the bed in the same position in which we left her, and she said nothing to the effect that she wanted to get out. Rube was sitting in a chair in front of her. After sitting there a while, Joe and Bena and I went out together. We talked about taking her up town to Hamlin's where she could stay all night. We were about three hundred yards from the office when Slim came up and said, 'Where are you going?' We said, 'We are going to take her to Hamlin's.' She didn't say anything then, but afterwards said she didn't want to go there. Then we proposed to take her to the preacher's house. She said she didn't want to go there, but gave no reason. We then talked of taking her to the hotel. She didn't want to go there. Then Slim said, 'Well, she can go with me.' I don't remember what she did, but she went. I didn't see them any more that night."

We have set out so much of the testimony as discloses the record made touching the matter complained of. The error assigned upon the admission of this testimony is as follows:

"In permitting the prosecuting witness, Bena Runge, over defendant's objections, to testify that Jack Creglow, on the night when it is claimed defendant assaulted her, had sexual intercourse with her up town, and also in permitting her to testify that on the same night one 'Frank' had intercourse with her in the barn on the Fairgrounds and that Lee Harper or 'Slim' had intercourse with her, both at the barn and at his house, the defendant not being present at any of said times, and said several acts of sexual intercourse being separate, distinct, and independent transactions."

This assignment of error is based upon the assumption that these were separate, distinct, and independent transactions, having no relationship to and in no way tending to

1. CRIMINAL
LAW: other of-
fenses: admis-
sibility: rape.

support the State's contention that the defendant committed the act charged to have been committed by him. Acts committed by others of a similar character to the one charged against him, when committed in his absence, have no probative force upon the issue tendered.

It is true, as a general proposition, that in a criminal case of any kind, it is not competent for the State to show the commission of other crimes, separate, distinct, and independent of the crime, even where the crime—the independent, separate, and distinct crime—was committed by the defendant himself, and much more certain it is that independent, distinct and separate crimes of a like character, committed by others, even upon the same person, are not, as a general rule, admissible against the defendant. But to these rules there are exceptions, and those exceptions have peculiar relevancy and force in this case.

If her story is true, and it was for the jury to say whether it was true or not, this defendant had, at the time of the meeting with this girl, a slight but friendly acquaintance. He took her from where he met her, under a pretense that he desired to communicate something to her, to tell her something. This was very early in the evening and then in the heart of the city. She walked with him, he having hold of her, to a lonely place. He then assaulted her against her will, and committed upon her the crime charged. Thereafter, he took her by a circuitous route, until he met the young man Creglow. From there he took her down to the machine sheds, in company with Creglow. He there stepped aside, and Creglow then committed the same act upon her as charged against this defendant. The defendant, still keeping her in his possession, if her testimony is true, still controlling her actions, for she said it was under protest, took her to this room at the Fairgrounds. There he met with these other friends of his. He and Creglow, having accomplished their purpose, went out from this room and left her there, they say to get a drink of water. She claims that, during their absence, she

was again ravished by two of these parties left with her in the room. From every act, from the first to the final act, when she was surrendered to the custody of Slim and he took her to his house, it would appear that the defendant was supervising and controlling her actions. If her testimony was true, Creglow and the defendant took hold of her, led her from the Fairgrounds and turned her over to the possession of Slim, who then, with their knowledge and apparent consent, if her story is true, took her to his home. Every fact is so closely related with the first fact that they cannot be said to be separate, distinct, and independent acts.

In the case of the *State v. Hogan*, 145 Iowa 352, the defendant was charged with rape. The defendant was convicted, appealed and complained of the admission of evidence tending to show the commission of the same act by one Rohn shortly before the commission of the act by the defendant. The court said: "The testimony on behalf of the state tended strongly to show concerted action between Rohn and one Hausler and the defendant. The same offense was committed by each one in succession in a barn at the home of the defendant, and in the successive order above named. They were together at the barn shortly before the offense was committed by Rohn, and were together at the time it was committed by the defendant, and for some hours thereafter. Rohn procured the presence of the prosecuting witness at the barn. It is claimed on behalf of the defendant that Rohn's offense was entirely distinct and separate, and that it was committed before that of the defendant, and that it was, therefore, prejudicial to permit evidence of it. . . . It appears also from the evidence on behalf of the state that the offense was again committed by the defendant some hours later in the day at another place not far away. The state introduced its evidence concerning both of the alleged acts on the part of the defendant, and at the close of its evidence elected to rely upon the last." It was claimed in that case that this election further separated Rohn's act from the act upon which con-

viction was asked. The court said: "If it were true, that the act of Rohn was separate and independent from that of the defendant, then the contention of the defendant as to its inadmissibility as evidence would be good. But, under the evidence on the part of the state, the act on the part of Rohn was so connected and related to the acts of the defendant that it was admissible as one of the surrounding circumstances of the case. Being admissible as such circumstance, the fact that it involved the commission of another crime did not render it inadmissible."

As bearing upon this question see *State v. O'Connell*, 144 Iowa 559; *State v. Vance*, 119 Iowa 685; *State v. King*, 117 Iowa 484; *State v. Brady*, 100 Iowa 191; *State v. Desmond*, 109 Iowa 72.

The general rule is, that the State is not permitted, in its efforts to establish the crime charged, to introduce evidence of another substantive offense, but the rule is that, where the acts are all so closely related in point of time and place and so intimately associated with each other that they form one continuous transaction, the whole transaction may be shown, what immediately preceded and what immediately followed the act complained of, for the purpose of showing the *scienter* or *quo animo* of the party charged. This, it seems, is clearly true when, through the mist of it all, the jury can discern the presence and dominating character of the accused. Every fact, every circumstance surrounding the parties, attending their action, from the time of the meeting to the separation, is material to a proper understanding of their relationship, and has probative force in establishing their conduct towards each other.

Distinct, independent, substantive offenses, not related to the one charged, committed at different times or different places, cannot be shown against the defendant, but not so when the time, the place, the circumstances and the parties all have relation to and are directly or indirectly involved in the act

charged at the time of its commission or immediately before or after, and we think this is the doctrine of the cases cited.

We think the court did not err in the admission of this testimony.

It is next contended by appellant that the county attorney in his argument to the jury was guilty of misconduct. This error is assigned in the following language:

“Misconduct of the county attorney in making improper and prejudicial remarks to the jury in both his opening and closing arguments to the jury, and in which he attacked the character of the defendant, when it was not in issue, and appealed to the passions and prejudices of the jury, declaring among other things, ‘that if it had been my daughter instead of Bena Runge, this man would not be on trial here, but Simon Fisher would be on trial.’ ”

Unfortunately for us, the argument of counsel for the defendant was not taken down by the reporter, and is, therefore, not in the record of this case.

It is claimed by the State that much of the argument of the state’s attorney, of which complaint is made, was in reply to statements made by defendant’s counsel in their argument to the jury. The portions of the argument of the state’s attorney, to which special attention is called and which are claimed to be highly inflammatory and not warranted by the record, are substantially as follows:

In the opening argument the counsel said: “This crime is infinitely more revolting than the taking of human life. If any of you have sisters—and some of you have—if any of you have daughters—and a number of you have—you would infinitely rather that your daughter would be slaughtered in cold blood than to have been treated as Bena Runge was on this night.”

Again in speaking of Slim and Frank, he said: “But

they are both gone, and if they weren't gone, they would be sitting behind the table where Joe Robinson and Jack Creglow are, and if I retain my health and hold this office long enough, they are going to be there."

Again, "Gentlemen, I am frank to say that in the trial of a criminal case, I always try as hard as I can, to keep within the record, and even to be fair to the defendant, but in a case such as this, that touches the whole community, that touches the morals of the community, in a crime like this, where, if the defendant should go free every home is in danger, every virtuous girl that goes upon the streets of Rock Rapids or other villages in the county, are at the mercy of the ravisher. I say it is hard, gentlemen, in the argument of a case of this kind, to prevent yourself from injecting a little feeling into a case. I never can entirely detach myself from the thought that it might not have been Bena Runge that fell into the hands of these fiends. It might have been your daughter just as well—it might have been your sister—it might have been my daughter, and I thank God that it was not my daughter—you thank God it was not yours, because if it had been my daughter, this man would not be on trial here, but Simon Fisher would be on trial."

At this point the court admonished Mr. Fisher and said, "I think you are going too far, and the jury is cautioned not to regard that argument, and counsel is cautioned not to repeat it."

Thereafter, counsel said in argument: "She was in there like a caged bird, with no means of defense, as helpless as a little babe, at the hands of these men, and the surprise to me is, gentlemen, that there was not one man, one fellow there, at least one, that had left in him a spark of what you and I call manhood. Why gentlemen, in the wildest and wooliest days of the West, in the mining camps, out upon the ranges, anywhere, there is nearly always, even among the roughest of men, one fellow or more who has retained a spark of manhood, and if that child had been brought before them

and any man had threatened to violate her person, there would have been a gun drawn, and someone would have said, 'The first man who touches that girl dies,' but I am sorry to say you didn't find any of it in Rock Rapids that night, not a spark of manhood in any one of the men that were there. Why, gentlemen, I believe that there is not one of you—there is not a right thinking man anywhere, that, under such circumstances, would not have said, 'Before you violate the person of that girl, you will walk over my dead body.' That is what you would have said. You could not help but say it. When you think of your mother—when you think of your sister—when you think of your wife—when you think of your daughters, you could not help but have said it. No man could help but say that and do that, that has the least spark of manhood in his makeup, and yet they were all foul. Ah, gentlemen, it is a pity—it is a pity. I am sorry that such things can be done in so-called civilized communities, but they have happened."

While the argument is set out in full in the abstract, the portions above set out are the only portions of which complaint is made.

We are invited to say that this was misconduct on the part of the counsel and reliance is had upon *State v. Proctor*, 86 Iowa 698; *State v. Helm*, 92 Iowa 540; *State v. Hasty*, 121 Iowa 507, 520; *State v. Hermann*, 135 Iowa 167; *State v. Fuller*, 142 Iowa 598; *State v. Hunt*, 144 Iowa 257.

Taking the cases in the reverse order, we find that *State v. Hunt*, *supra*, was an action for seduction, and it was complained that the prosecuting attorney, in his closing address, pointed to the child, then a mere infant, and declared it was all the evidence that any man would ask on the defendant's connection with the offense. The court said: "This was, in effect, an exhibition of the child to the jury for the purpose of determining an alleged resemblance, and was seriously improper conduct on the part of counsel," and reference was made to *State v. Danforth*, 48 Iowa 43, and *State v. Harvey*,

112 Iowa 416. In the first case, it was held reversible error to exhibit the child to the jury for the purpose of determining a supposed resemblance. This action of counsel was held improper and a ground for reversal because it sought to introduce a factor into the case indirectly, which was not permitted to be done directly.

In *State v. Fuller*, 142 Iowa 598, counsel for the State said: "How many men are there whom you know, and whom I know, that, instead of going to a literary society and pulling John Fuller out by his coat collar would have gone and brought him out either with a club or a gun?" The court said: "We have often held that such remarks are sufficient to justify a reversal." This was a case in which the defendant was indicted and tried for the desertion of his wife.

In *State v. Harmann, supra*, defendant was tried and convicted of adultery. The counsel for the State in addressing the jury said: "Instead of trying a case of adultery here, Gentlemen of the Jury, you should be here for the purpose of determining whether or not Jacob Kiefer was guilty of murder if he had exercised his manhood and taken a gun or pistol and shot through the heart of Dr. Harmann." This court said: "There is enough of a disposition for unthinking and unreasoning persons to take the law into their own hands without having it encouraged by ministers of the law. It was the duty of the attorney who made this statement to discourage the very thing which he was countenancing, and there was no other reason for making the statement than to inflame the passions and induce the jury to right a supposed wrong which a party had neglected to perform on his own behalf. . . . It was improper for counsel to suggest such a remedy. The case in this respect is ruled by *State v. Proctor*, 86 Iowa 698, and *State v. Helm*, 92 Iowa 540, each of which is closely in point."

In *State v. Hasty, supra*,—this was an action for seduction—the attorney for the State said: "While I would not advise taking human life, Lemuel White would be justified in taking

the life of defendant." This court said: "This was but the expression of the attorney's opinion of what White would have the right to do in the future, not of what he ought to have done, or should do. In this, it differs from *State v. Proctor*." This court further said in substance, "When the remarks indulged in relate to a future course of conduct and do not pertain to the result of the trial, they can hardly be regarded as prejudicial, and especially is this true if not calculated to unduly arouse the passions of the jury or divert its attention from the proper discharge of its duty."

The court, though expressing disapproval of the language used, and stating that it was unsound in law and opposed to modern notions of good morals, did not consider it sufficiently prejudicial to justify a reversal. It related rather to the opinion of what the attorney thought Lemuel White would be justified in doing in the future rather than to a statement as to what the jury should do in the particular case in avenging the wrong complained of; while in the case at bar, there was a direct appeal to the jury to do what counsel claimed anyone with a spark of manhood would do to avenge the wrong which counsel says should have been avenged, and which he would have avenged if it had been his daughter, by the taking of a human life.

It is impossible to lay down any hard and fast rule in matters of this kind, so much depends upon the character of the case, the nature of the remarks complained of, the disclosures made by the evidence, and the argument of counsel which preceded the argument complained of. We recognize the fact that it is difficult for counsel often, even in a fair and honest discharge of his duty, to so moderate his speech as not to, at least in some degree, appeal to the sympathy, prejudice, or even passion of the jury, and we do not want to be understood as even suggesting any fixed rule of limitation upon his rights in addressing the jury. Each case must be determined on its own facts, and in the light of the circumstances that attended the delivery of his address.

One elected to the office of county attorney, to represent the people in the prosecution of criminals, occupies a close relationship to the administration of the law and to the court, and should have no ambition beyond that laudable one to see that no guilty party escapes. But it is not for him to assume, as prosecutor, the guilt of the defendant at any stage of the proceedings. The defendant is presumed to be innocent until by the evidence he is shown to be guilty. The jury are empaneled and sworn to determine this question. Their judgment should be unbiased, unprejudiced, uninfluenced by any consideration other than the evidence submitted to them, and the law given to them by the court. Appeals to the passion, prejudice, or to the jury to stand up like men and show their disapproval of the crime charged, by convicting the defendant, are unauthorized and unjustified. Jurors are but human and respond humanly to those appeals. Called into the arena by counsel to condemn crime abstractly, and to show their manhood or lack of manhood in this manner, they are led into the trap that requires them to condemn the defendant to vindicate themselves. This is not the spirit of our law. This is not the purpose for which arguments to the jury are permitted. This is subversive of a fair administration of public justice. It is against the law and good morals.

We think, in this case, counsel went too far. Knowing counsel, we believe that he did this honestly, but in a mistaken zeal for the cause he had espoused. In view of this record, much of what was said by counsel in his argument had little to justify or support it.

It is next contended that there was insufficient corroborating evidence. We pass by this argument with the remark that a careful reading of the record satisfies us that there was abundant evidence of corroboration. The law requires corroboration only in so far as it is necessary to connect the defendant with the commission of the crime. The commission of the crime may be proven by the testimony of the prosecuting witness.

8. RAPE: cor-
roboration:
on what phase
of case
necessary.

Complaint is made of a portion of the twelfth instruction given by the court to the jury, in which the court said: "You are instructed that the force necessary on the one hand to commit the crime of rape, and the resistance required on the other hand to constitute the crime, depend upon the relative mental and physical strength of the parties, and the circumstances surrounding them at the time of the alleged assault."

4. RAPE: force and resistance: mental and physical strength of parties: instructions.

We think this instruction was justified by the record, although there was no direct testimony as to the mental or physical strength of either party. The parties were both before the jury, and the jury were competent to judge of that matter.

It is next objected that the court erred in instructing the jury in the fourteenth instruction given by the court, in which the jury were told that if they found from the evidence that the defendant fled from the town of Rock Rapids to avoid arrest and prosecution for the offense charged against him, "you may consider this evidence and the circumstances of his leaving, with all the other evidence and circumstances proven on the trial, and give to the evidence and circumstances attending defendant's departure from the State, such weight and credit as you believe it entitled to receive in determining the guilt or innocence of the defendant."

5. CRIMINAL LAW: flight in absence of accusation: effect of: instructions.

It is claimed that there was no evidence to justify this instruction, but it appears that the defendant left the state soon after the time when it is alleged that this crime was committed. It does not appear, however, that he had, prior to the time he left, been charged with the commission of the crime; but it is a very old saying that "Conscience does make cowards of us all," and further, "The wicked flee when none pursue." We think there was sufficient evidence to warrant this instruction.

For the errors pointed out, the case must be and is—*Reversed*.

DEEMER, C. J., LADD, WEAVER, EVANS, PRESTON, JJ.,
concur. SALINGER, J., special concurrence.

SALINGER, J., concurring specially:

It appeared in testimony that defendant had connection with prosecutrix against her resistance; that thereafter he permitted her to walk away in his company; that they met one Creglow, who then had intercourse with prosecutrix against her resistance; that Creglow left, and that thereupon defendant took her to a room with a bed in it, and situated on some Fairgrounds; that when she arrived seven men were already there—and it is a fair inference that Creglow was one of these men.

As to what occurred while the girl was in this room and thereafter, it was testified, over objection, that all the men present, including defendant, left the room except one Slim, who, after the others left, had connection with her against her resistance; that thereafter Slim left the room and another came in, who attempted connection but failed, and left; that thereafter one Frank came into the room and forcibly had connection with prosecutrix; that she was left alone for awhile, and then all of the men came back and sat down and talked together; that then two others came to the door, and two went out and talked to them, and then the four returned. Thereupon defendant and Creglow took her from this room to the Fairgrounds, keeping hold of her in the meanwhile. At this point Slim and Creglow let go of her, but Slim again took hold of her, and thereupon Slim and defendant took her to a wagon bridge, at which point defendant let her go, and Slim held her alone. He took her alone to a house, and after they arrived there, he made her undress and get into bed; came into bed with her, and made her lie and remain there.

The indictment charges none of these acts, other than

the actual ravishment of prosecutrix by defendant, and it is urged on this appeal that it was error to admit this testimony as to what occurred subsequent to the alleged ravishment on part of defendant.

The opinion concedes that, as a general proposition, evidence of crimes other than the one charged in the indictment is inadmissible, even where the independent crimes were committed by defendant himself; and that this is, of course, true as to independent crimes of like character committed by others upon the same complainant. In sustaining the admission of this testimony, the opinion plants itself, as it must, upon the claim that there are exceptions which permit the testimony here complained of. I concede the existence of exceptions to the admitted rule, but am unable to agree that the testimony admitted is within any of them. The conditions of fact which are relied upon to make some of these exceptions applicable are stated thus:

1. Defendant used a false pretense to induce prosecutrix to go where he ravished her.

2. After accomplishing his purpose, he took her by a circuitous route until they met Creglow; that he took prosecutrix on in company of Creglow to some sheds, there stepped aside, and that then Creglow ravished her.

3. That because in going from the place where she was ravished by Creglow to the Fairgrounds, she went under protest; therefore, defendant still controlled her actions and kept her in his possession.

4. At the Fairgrounds he met a group of other men; he and Creglow left her in a room on the Fairgrounds, and during their absence she was again ravished by others, either left with her in that room, or who returned to it after having left.

5. That finally she was turned over to the possession of Slim, who took her to his home, kept her there all night and again ravished her.

It is said by way of deduction from these premises that,

"By every act, from the first to the final act, when she was surrendered to the custody of Slim, and he took her to his house, it would appear that defendant was supervising and controlling her actions. If her testimony was true, Creglow and the defendant took hold of her, led her from the Fair-ground, turned her over to the possession of Slim, who then with their knowledge and apparent consent, if her story is true, took her to his home."

"Through the mist of it all the jury can (could) discern the presence and dominating character of the accused."

I. This asserts that if, subsequent to the ravishment of prosecutrix by him, defendant was "supervising and controlling her acts," this makes the testimony which I challenge admissible within some of the exceptions to the rule.

Conceding, for the sake of argument, that proof of such domination makes some of the exceptions applicable, I am unable to see how the use of a false pretense to bring prosecutrix to the place where she was assaulted, or that Slim forcibly detained her in his house, proves that, subsequent to the ravishment by Slim, defendant "was supervising and controlling her actions." That there is other testimony which does establish such domination is immaterial on the point I am now discussing. Assume that the trial court proceeded rightly in receiving what tended to prove supervision and control, it was still error to admit testimony which does not tend to establish such supervision and control. As it is impossible to know upon just what testimony the jury based its verdict, I have no way of knowing whether, or to what extent, the verdict as a whole was controlled because of the evidence as to this false pretense, and this detention on the part of Slim. That proper evidence of dominance on the part of the defendant might be admissible as a basis for admitting other testimony, or admissible for any proper purpose, is no answer to having let in testimony which is inadmissible upon the theory advanced for its admission, or any other. Let the fact

of dominance be material and, therefore, proper evidence of it admissible, it was yet error to admit these two items. The admission of them should be held to constitute prejudicial error: first, because they show on their face that they tend to be injurious; and, second, because prejudice is presumed from the error in admitting them.

II. While it is at least debatable whether ravishment by others at which defendant connived establishes dominance on his part over the prosecutrix, it is manifest that one who himself rapes a female does exercise unlawful domination over her. Connivance at rape is, at its worst, no more than the equivalent of rape personally committed. Now if, as the opinion concedes, subsequent ravishment by defendant would, standing alone, not make such rape admissible, neither would conduct on his part, which is but the equivalent of a rape committed by him, make what his conduct connived at admissible, standing alone.

As I understand it, the majority realizes this, in that it does not put its holding on the naked fact that other rapes were committed with co-operation of defendant, but on the express ground that the acts were not separate and independent, and had probative force on the conduct of defendant and prosecutrix—which, if true, I concede, puts these acts within the exception to the rule. The opinion says:

“Every fact is so closely related to the first act that they cannot be said to be separate and independent acts. The general rule is that the State is not permitted, in its efforts to establish the crime charged, to introduce evidence of another substantive offense; but the rule is, that, where the acts are all so closely related in point of time and place and so intimately associated with each other that they form one continuous transaction, the whole transaction may be shown, what immediately preceded and what immediately followed the act complained of, for the purpose of showing the *scienter* or *quo animo* of the party charged. Every fact, every circum-

stance surrounding the parties, attending their action, from the time of the meeting to the separation, is material to a proper understanding of their relationship, and has probative force in establishing their conduct towards each other.

“Distinct, independent, substantive offenses, not related to the one charged, committed at different times or different places, cannot be shown against the defendant, but not so when the time, the place, the circumstances and the parties all have some relation to and are directly involved in the act charged at the time of its commission, or immediately before or after; and we think this is the doctrine of the cases cited.”

On analysis, this asserts that the testimony is not within the rule which excludes distinct, independent, substantive offenses not related to the one charged, and committed at different times and different places, and unrelated to the offense charged, because:

1. The acts are all so closely related in point of time and place and so intimately associated with each other that they form one continuous transaction.

2. What immediately precedes or follows the act complained of is admissible for the purpose of showing the *scienter* or *quo animo* of the party charged.

3. The rule does not apply when the time, place or circumstances and the parties all have some relation to and are directly involved in the act charged at the time of its commission, or immediately before or after.

4. Every fact or circumstance surrounding the parties or attending their actions, from the time of meeting to the separation, is material to a proper understanding of their relationship.

5. Every fact and circumstance surrounding the parties or attendant upon their action from the first meeting to final separation is not only material to a proper understanding of their relationship, but has probative force in establishing their conduct towards each other.

III. a. The effect of conduct immediately preceding the act charged is not in the case, because all the acts involved in this testimony were committed subsequent to such act.

b. None of the testimony can be defended on the ground that it tends to show *scienter* or the animus of defendant. The exception which permits acts not charged to be introduced for that purpose is merely a recognition of the fact that when the purpose and intent with which an unlawful act was committed is under investigation, similar acts committed by the same person at other times have probative force. Thus, on a charge of obtaining property by false pretenses, that defendant had made other false pretenses,—and, more strongly, of course, if he knew when he made such other pretenses that they were false,—tends to show he did not innocently or mistakenly make the pretense indicted for. Such evidence is rightly admitted because it makes it more likely he made the pretense at bar with fraudulent intent. Manifestly, this reason for letting in evidence of other acts has no place here. That which must be done to constitute rape, of itself, supplies proof of *scienter* and indicates the animus of the assailant. No question can arise on whether a ravishment may not be due to accident or mistake, or have been accomplished without evil intent. It is clear this testimony should not have been, and was not, received on *this* theory.

c. While it is true that the exception may not be applied unless the elements referred to by the majority are present, it does not follow that it may be applied if the things so referred to do appear but stand alone. I do not believe that even if the acts are closely related in point of time and place, are so intimately associated as to form one continuous transaction, and have relation to and are directly involved in “the act charged at the time of its commission,” or immediately after, this will alone base the exception. Nor can I agree that any or every act or circumstance surrounding the parties or attending their actions, from the time of meeting to

separation, is of necessity material to a proper understanding of their relationship, or necessarily material for any purpose. The true rule, as I conceive it, is this: While closely related acts, steps creating one continuous transaction, and all matters relating to, and directly involved in the act charged, and all facts and circumstances surrounding the parties or attending their actions may be admissible, though not acts charged in the indictment, and though such acts are inadmissible if these elements are absent, they may remain inadmissible even though these elements do appear, and their admissibility does not depend so much upon what they are related to or attendant on as upon what they prove concerning the act charged. If the rule is as broad as the majority asserts, it would be proper to show that it hailed immediately after the rape was accomplished; or that the man had no shoes on while committing the crime; or that while engaged in it, he shouted approval of the beating of a horse, which was occurring in his sight; or that he left his victim for a few minutes and went to a neighboring house and there committed a murder, upon which he immediately returned, and again assaulted prosecutrix.

That the subsequent acts at bar were related to the crime charged must be conceded. They were related, in the sense that they are of a character akin to the act charged; that they are all directed to the prosecutrix; that defendant was in some way a participant, and that all were done in the same neighborhood and on the same day. But if defendant had met prosecutrix at different hours of the same day and at different places and ravished her at each meeting, every element relied on by the majority would be present; and the relationship to the main act, both as to the character of the subsequent acts and as to parties, would be even more clearly made out than is done by the subsequent acts testified to here. But would that have warranted proof of the acts of rape subsequent to the act charged?

On the other hand, if a stranger had, shortly before

the ravishment, struck the woman a savage blow upon the head with a heavy club, evidence of this would be admissible, though a distinct crime committed without defendant's knowledge or co-operation, because it bears on the physical condition of the victim subsequently ravished, with reference to her capacity to make resistance. And so if, after the ravishment, and while the woman was attempting to reach some of her friends, a stranger had abducted her, keeping her for several days, evidence of this act would be admissible because it would explain the failure to make immediate complaint.

If a man in the very act of ravishing a woman should employ one hand in a robbery by violently taking a pocket-book attached to the person of his victim, the act would be intimately related to the ravishment in point of time and place, and would be a part of the transaction in the sense that it occurred during the very time and between the very parties, and involved another crime of violence committed by one upon the other. But it would not be claimed that evidence of this robbery is admissible. It would not be, because, while it meets the other standards, it has absolutely no probative weight on whether the intercourse was accomplished in such manner as to constitute rape, or, for that matter, on whether defendant was guilty of anything but the robbery.

Enough has been said to indicate what I conceive to be the vice of the opinion. While it holds rightly that there must be intimate relationship, both in matter and as to time and place, it errs in holding that this alone suffices, without reference to whether the act thus related has probative bearing on whether defendant raped prosecutrix, as charged. It also errs in holding that the acts in question had such probative value. True, the conduct in question tends to show that the defendant is a man of the worst moral tendencies and of a very low type, and thus furnishes some evidence that he is more likely to commit a rape than a better man would be. But that affords no basis for applying the exception, because in nearly every instance in which other acts

are excluded, they would, if admitted, tend to show that the defendant was one more likely to commit the act charged than a better man would be. If this defendant had in his past committed murder and incest and been guilty of numerous seductions, it is clear that proof thereof would tend to show that he had a disposition and record which made it no sudden departure from his standards to commit rape. But, of course, such testimony would not be admissible for such purpose. This squarely presents the essential error in the opinion. Concede that these subsequent acts were by the procurement of the defendant; concede that this shows him to be capable of committing rape; concede that they have relationship to the main act in point of time and place; concede that they were of the same nature, and that they began when the main offense ended,—in what way are they relevant? In what way do they tend to establish the charge in the indictment that this defendant himself raped this prosecutrix, an act which, under the proof, he committed before any of the other acts were done? In what way are the subsequent acts “involved” in the prior rape “at the time of its commission?” How do they show “one continuous transaction?” How do they help to a proper understanding of the relationship between defendant and prosecutrix or “establish their conduct towards each other?” In what way do they competently tend to show that the rape charged was committed? Suppose the defendant did procure, shortly after assaulting the prosecutrix, the rape of her by others, how does that prove that he had connection with her against her uttermost resistance? This testimony is so far from being proof of the charge as that, if defendant had sought to introduce same and it had been refused, there would be a more serious question. For, so far from proving that prosecutrix yielded after the utmost resistance she was capable of, it tends to indicate that, on the contrary, nothing had occurred between her and the defendant which angered her or created a desire to flee from him, and it indicates, also, that she is one unlikely

to make resistance. In other words, so far from proving that the defendant did what the law defines to be rape, it indicates, rather, that whatsoever he did was with the consent of the prosecutrix. Now, anticipating that it may be said that since the testimony had this tendency the defendant was not prejudiced, I have to say that, while this may be true theoretically, it is manifest that the direct and natural effect of this testimony was to anger the jury by the exhibiting of conduct so utterly reprehensible as that the presenting of it in testimony, beyond all question, inclined the jury more strongly to find guilt as to the main charge than it would otherwise have been. If testimony had been admitted that, for a year before and up to the time of the alleged ravishment, the defendant had lived upon the earnings of the prosecutrix as a prostitute, in theory, this would be strong argument to the jury that defendant did not have to use force to obtain intercourse, and, therefore, did not use it. Yet there can be no question that exhibiting him as a parasite, living upon the sale of the woman's body, would make the average jury much more ready to convict for rape, or anything else that might be charged.

In *State v. Hogan*, 145 Iowa at 354, the evidence tended strongly to show concerted action between one Rohn, Hausler, and the defendant, that each in turn committed the crime, the defendant being last. The crimes were committed in his barn. The three were together at the barn shortly after the offense was committed by Rohn, at the time it was committed by defendant, and for some hours thereafter. Rohn had procured the presence of the prosecutrix at the barn, and before the trial of the defendant, Rohn had been convicted of his offense.

Some hours later in the day, in another place, not far away, defendant again committed the offense. The State introduced its evidence concerning both of the alleged acts on the part of defendant, and at the close elected to rely upon the last. *Hogan's* case merely says that the act of Rohn was

not separate and independent from that of defendant, but "was so connected and related to the acts of the defendant that it was admissible as one of the surrounding circumstances of the case." No argument beyond these quoted words is attempted, and, of course, these cannot be said to be more than the assertion of a naked conclusion. To appreciate how little real consideration was given to the question, it may be pointed out that the only citation in support is *State v. O'Connell*, 144 Iowa 559, wherein an exception, which all concede to exist, was applied: to wit, that on the charge of uttering an instrument on which defendant had forged an indorsement, evidence tending to prove another crime is admissible for the purpose of showing guilty and fraudulent intent on part of the one charged. Aside from this, there is reasonable ground for distinguishing the case at bar from the *Hogan* case. Its essence is that where one man procures the victim, and he and the defendant thereupon proceed to ravish her by concerted action, and the defendant again uses the opportunity originally created by the first procurer, then the acts constituting the procurement are admissible. The difference between this and the testimony at bar is that the first does show acts related probatively to the act charged; while in the last, the acts are connected in point of time and place, and are in a sort of a logical relation, but yet have no probative value as to the act charged. It is one thing to prove against one who committed a rape that he accepted the help of another with whom he joined in the crime, and used the opportunity first provided by the accomplice to repeat the act and so connect with the act elected for prosecution. It is quite another to admit proof of rape committed with the connivance of the defendant after his own act had been completed. The first is not merely taking evidence of an independent offense, but is also proof of methods employed to obtain the criminal intercourse. The testimony at bar proves merely that the defendant procured the defilement of a woman whom he had already ravished. Regarding the *Hogan* decision

as I do, I have no occasion to indicate what I might deem my duty in the premises were it a ruling that substantially what was done in this case is not error.

There are those who will simply assume that this defendant is guilty of rape and urge that, therefore, there should be no straining at the methods that brought about his punishment. The execution on order of Judge Lynch is always excused with the assertion that justice has been accomplished even though the law was violated in the accomplishment. This line of reasoning should not appeal to a court of last resort. But bad as it would be to entertain such insistence, worse is involved in sustaining the taking of this testimony. The servants of the law should not permit a *guilty* man to lose a single right which the law gives him. If this can be doubted, it at least is not doubtful that no infraction of the rules of evidence should be permitted to the harm of one who is presumed to be innocent. If *lex talionis* may prevail as to those who are guilty, even that is no warrant for disregarding the law in such manner that juries may be influenced into finding an innocent man guilty. When this testimony was taken, the presumption of innocence still obtained. Desire to be sure that none guilty shall escape does not warrant the doing of what may unduly bring about a verdict of guilt. The oath of the judge should restrain us from even considering whether and how far we should be tolerant of what was done to bring about the punishment of the perpetrator of an atrocious crime. What we have for review is whether an innocent man may not have suffered a denial of rights guaranteed to him by the law of the land, by and through the introduction of testimony which, of necessity, must have been highly inflammatory and calculated to be an advocacy of his conviction on general principles.

I agree to the conclusion reached but would reverse, also, because this testimony was admitted.

MARY BOSWORTH et al., Appellants, v. JOHN M. BLAINE et al.,
Appellees.

HOMESTEAD: Surviving Spouse—Distributive Share or Homestead—Presumption—Election to Overcome. On the question whether a surviving spouse took (a) the absolute or distributive one-third right or (b) the homestead occupancy right, the presumption, in the absence of evidence, is that the survivor took the former. Hence arises the necessity of showing an *election* to take the homestead occupancy, in order to overthrow the presumption. If continued occupancy is relied on to show such election, it must be an occupancy not only consistent with this homestead right, but an occupancy maintained under and because of such right. *Held*, presumption not overthrown.

PRINCIPLE APPLIED: The husband had lived on the 116 acres in question with his wife, who owned the land, for some twenty-four years before her death. After her death, a new house was built, in which the husband continued to live with his minor children. An older son lived in the old house and farmed the place. All these buildings were on the same forty, which was equal in value to one-third of the entire land. The father had an arrangement with his children by which he received rent which was applied first to his support and the balance on a two-thousand-dollar mortgage on the land. Five years after his wife died, he mortgaged his undivided one-third of the land. He repeatedly made efforts to sell the land, and, among other acts, placed it in the hands of several real estate agents. He never unequivocally asserted a homestead right in the land. Nine years after the death of the wife, a judgment was rendered against him, and levy was made on the land. *Held*, the evidence failed to show an election to take the homestead right, and therefore the presumption that he took the distributive share must prevail.

Appeal from Linn District Court.—HON. MILO P. SMITH,
Judge.

FRIDAY, MAY 14, 1915.

ADELIA COLEMAN died February 5, 1904, seized of 116 acres of land incumbered for \$2,000. After her death her

surviving husband, N. R. Coleman, with his minor children, continued in occupancy. In 1913, defendant Blaine obtained judgment against Coleman and caused execution to issue and be levied on said land, and was about to sell the same when this action was begun, praying that said sale be enjoined, for that said Coleman had only a homestead interest therein. On hearing, the petition was dismissed. The plaintiff appeals.—*Affirmed.*

Deacon, Good, Sargent & Spangler, for appellants.

Randall, Courtney & Harding, for appellees.

LADD, J.—The defendant Blaine obtained a judgment for \$434.00 against N. R. Coleman, October 2, 1913, and caused execution to be levied on 116 acres of land on which Coleman

had resided since 1880. It was in his wife's name. She died in 1904, and the only issue is whether subsequent thereto he elected to take a homestead in lieu of his distributive share. The 40 acres on which the buildings are located are quite as valuable, if not more valuable than a third of the whole. Shortly after the wife's death, a new house was erected on this 40 acres into which N. R. Coleman and his children, other than his son Leslie, moved; and Leslie with his family occupied the old house and has since conducted the farm, paying N. R. Coleman one-half of the grain raised as rent, and testified that "the rent he was to receive, after setting aside enough for his support, was to go upon the notes against the place. He was to get just what he needed."

The evidence leaves no doubt that the children expressed a willingness that Coleman should make use of the farm as long as he might live, any surplus over his living expenses to go to the payment of the debt against the farm, and such was their arrangement with him, and undoubtedly they anticipated inheriting the entire property. Indeed, Coleman testified, "We had such an arrangement and I have been living there

ever since. I have been living there ever since. I have been getting my support from there and whatever was left was paid upon the debts of the estate. The arrangement with the children was with regard to the whole farm."

In examination supplemental to execution, he testified that he claimed a homestead right in the land and an undivided one-third thereof and that he had so stated to his children. On his attention being directed to this, he testified that what he had stated was true, but on re-direct examination explained that when he gave this testimony he had not understood what was meant, that he always claimed his homestead only. He denied ever having stated to his children that he claimed the distributive share and testified farther:

"I offered the farm for sale as soon as my wife's death. If it was sold I was to get money enough to pay these notes. That is not the reason I offered it for sale. I couldn't farm any more. It had been up for sale years before these notes were made and I never withdrew it. It was for sale at a certain price. If anyone had offered that price it would have been sold by the heirs, I suppose. I didn't tell anybody that I had to consult with the heirs in order to sell it. It might have been listed in my name. I told them (agents) I claimed the right to sell it at that time. I believe I didn't consult with any of my children when I went to make arrangements to sell it."

He further testified that the homestead was all that he ever claimed, and that he never told anyone that he had a one-third interest in the land.

In 1909, he executed a mortgage to a Mrs. Hein on his undivided one-third of the land to secure an existing indebtedness. In 1910, he listed the farm for sale with one Cherry, giving him the exclusive right to sell during five months. He listed it for sale with Hunter in 1912, and during the same year with Leigh, telling him that if he "would get a move on

him" and sell that he would pay a note Leigh then held against him.

Root testified that Coleman told him he owned a one-third interest in the farm and would pay the notes given for one-third interest in a business out of the proceeds of the farm as soon as sold. It is unnecessary to reconcile the testimony; for the evidence remains that Coleman had, with more or less persistency, at all times after the death of his wife, undertaken to find a purchaser for the land. This was inconsistent with any inference that might otherwise be drawn that he had elected, by continued occupancy of the premises, to claim the same as a homestead. Though reason for so doing does not seem very persuasive, this court has always regarded the right to a distributive share in an estate as the primary right of a surviving spouse. *Wold v. Berkholtz*, 105 Iowa 370; *McDonald v. Young*, 109 Iowa 704; *In re Lund Estate*, 107 Iowa 264, 267.

To retain a homestead in the premises, then, an election so to do by the survivor must be evidenced in some way. *Stephens v. Hay*, 98 Iowa 37; *Wilcox v. Wilcox*, 89 Iowa 388, 393; *Egbert v. Egbert*, 85 Iowa 525, 534. Ordinarily, such an election is evinced by the continued occupation of the premises as a homestead by a surviving spouse and family. Even this fact is not conclusive. *Gray v. Wright*, 142 Iowa 225, 227. And where such continued occupancy might as well be referred to a lease from the heirs, as in *Robson v. Lambertson*, 115 Iowa 366, or to an agreement or an arrangement between the heirs and surviving spouse, as in *Hemping v. Hemping*, 141 Iowa 535, as to the claim under the homestead right, there is no room for the inference of an election to claim as a homestead. The evidence does not unequivocally indicate that Coleman ever asserted a homestead right in the premises. Though he continued in possession, this, according to the evidence, was under an arrangement with his children that he should so do, and his efforts to sell, shortly after his wife's death and later on, were utterly inconsistent with an

intention to continue in possession, which was the only method by which he could enjoy and preserve the homestead right.

The record utterly fails to establish an election to take the homestead right in the premises in lieu of the distributive share, and as the latter was the primary right to which he is entitled, it cannot be said that he has waived the same for the other. The district court rightly so decided, and its decree dismissing the plaintiffs' petition is—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

M. M. HEAD et al., Appellants, v. BOARD OF REVIEW et al.,
Appellees.

TAXATION: National Bank Shares—Nature of—Deducting Federal

- 1 **Bonds.** Federal statutes (a) forbid the taxation of federal bonds, etc., yet (b) grant the power to tax shares of stock in national banks. (Sec. 5219 Rev. Stat. U. S.) But as shares of stock in such bank are items of property, separate and distinct from federal bonds or any other item of property owned by the bank, it follows that the state, in determining the value of such shares for the purpose of taxation, is under no obligation, under the statute forbidding the taxation of federal bonds, to deduct the value of federal bonds owned by the bank, even though such bonds do enhance the value of the shares.

TAXATION: National Bank Shares—Private Bankers—Deducting

- 2 **Federal Bonds and Stock "Otherwise Taxed"—Unlawful Discriminations.** The federal statute granting the power to tax shares of stock in national banks provides, "that the taxation shall not be at a greater rate than is assessed upon *other moneyed capital* in the hands of the individual citizens, etc." (Sec. 5219, Rev. Stat. U. S.) But the clause "other moneyed capital" means "other moneyed capital *which is taxable*." Federal bonds are not taxable. It follows that Sec. 1321, Sup. Code, 1913, and the related sections, 1310, 1311, 1322 and 1322-1a, providing that in assessing the property of a private banker there shall be deducted from the value of his property (a) the value of federal bonds and (b) stock "otherwise taxed" owned by said private banker, while providing for no such deduction from the shares of stock of national, state, and savings banks and loan and trust companies, involve no discrimination against shareholders in national banks, and therefore no violation of said federal

statute. An intention that government bonds shall be taxed when declared by law not to be taxable, or that stocks shall be twice taxed, is not imputable to any of our legislative bodies.

Appeal from Greene District Court.—HON. M. E. HUTCHISON, Judge.

FRIDAY, MAY 14, 1915.

THE plaintiffs are owners of capital stock of the First National Bank of the city of Jefferson, and notwithstanding their objections, the several shares of said stock were assessed in 1912 and objections to said assessment were overruled by the board of review. Alleging the foregoing facts, together with grounds for the invalidity of Chapter 63 of the Acts of the 34th General Assembly, they prayed for issuance of a writ of certiorari. The court so ordered, and the board of review, together with officers comprising it, made return. Thereupon the parties stipulated the facts, and upon hearing the court dismissed the petition and confirmed the assessment. The plaintiffs appeal.—*Affirmed.*

Wilson & Albert, for appellants.

Church & McCully, for appellees.

LADD, J.—The shares of capital stock of the First National Bank of Jefferson were assessed to plaintiffs as owners and such assessment confirmed by the local board of review. The

regularity of the proceedings is not questioned, the sole contentions of appellants being that Chapter 63 of the 34th General Assembly is (1) unconstitutional, and (2) in conflict with the federal statutes relating to national banks. The capital stock of the bank was \$50,000.00, with undivided profits amounting to \$10,000.00, and it had real estate worth \$11,300.00 and owned U. S. bonds of the face value of \$50,500.00. The shares were assessed at \$97.50 each. In the

1. TAXATION:
national bank
shares: na-
ture of: deduct-
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bonds.

county were several private banks, a state bank, three savings banks and another national bank. Though the points are separately made, the appeal presents but a single question, and that is, whether the taxing laws of this state are a violation of Sec. 5219 of the statutes of the United States. The provisions of the Constitution invoked (Sec. 6 of Article 1 and Sec. 30 of Article 3) exact uniform laws and prohibit discrimination, and that is precisely the effect of the above section (5219), which reads as follows:

“Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.”

The particular contention is that the taxation of private banks, because of certain deductions from the assessed value thereof, results in a greater rate of taxation on national and other incorporated banks. That the point may clearly appear, we set out the portions of the statutes bearing thereon: Sec. 1310 of the Code Supplement, “All moneyed capital within the meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same

rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used."

Sec. 1311 of the Code Supplement: "No deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section fifty-two hundred nineteen, of the revised statutes of the United States."

Sec. 1321 of the Code Supplement: "Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

"1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items:

"2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

"3. The amount of all deposits made with them by others, and also the amount of bills payable;

"4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

“5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof; the aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits, and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five of this chapter, not including real estate, which shall be listed and assessed as other real estate.”

Sec. 1322 of the Code Supplement: “Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any), on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the

assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

Sec. 1322-1a, Code Supplement: "For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent. of the actual value thereof, determined as herein provided, which twenty per cent. of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district."

From these statutes it appears that, while the value of bonds (national or other) and stocks otherwise taxed in the state is to be deducted from the aggregate values of moneys and credits, less deposits, and the remainder, with other property pertaining to the business, assessed, no deduction of the kind are to be allowed in ascertaining the value of shares of stock in national and state, other than private banks. It is to be kept in mind that the shares as distinct items of property are to be assessed, and not the property of the corporation. Though the bank may pay the taxes, this is done not in its behalf but for the shareholders. Neither the corporation nor its property is assessed. This was first settled in *Van Allen v. Assessors*, 3 Wall. 573 (18 L. Ed. 229). There all the capital of the bank had been invested in non-taxable national securities, and yet, after great consideration, the court held that the shares of stock might be assessed under the laws of New York without taking into account the non-taxable character of the investment. Though some of the justices dissented, the court has since adhered to this decision. *People v.*

Commissioners, 4 Wall. 244 (18 L. Ed. 344, 349); *Lionberger v. Rouse*, 9 Wall. 468, 473 (19 L. Ed. 721, 723).

This was tantamount to saying that the tax on shares might not be construed as a tax on the capital of the corporation. *Bradley v. People*, 4 Wall. 459, 462 (18 L. Ed. 433, 435); *Hepburn v. School Directors*, 23 Wall. 480.

This construction of the statute was distinctly recognized in the recent case of *Home Savings Bank v. Des Moines*, 205 U. S. 503, 516, the court saying: "The right of such taxation rests upon the theory that shares in corporations are property entirely distinct and independent from the property of the corporation. The tax on an individual in respect to his shares in a corporation is not regarded as a tax upon the corporation itself."

The tax may not be levied on the corporation's holdings of bonds or other property, but on the shareholder's stock, and this irrespective of whether the holdings of the corporation are exempt from taxation in the hands of individuals or not. From these considerations and the exaction of equality by the federal statute, we conclude that: (1) shares of stock of national banks must be taxed to the individual owner; (2) shares of stock of state banks must be taxed to the individual owner; (3) the corporation or bank and the property which it owns are separate and distinct from the shares of the individual shareholder.

II. Though the shares of stock of the national banks are to be taxed to the owners of such shares, these may not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state.

2. TAXATION:
national bank
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federal bonds
and stock
"otherwise
taxed": un-
lawful dis-
criminations.

A rate may be greater, not only owing to a higher percentage of the levy, but in consequence of some method of assessment or taxation which would discriminate against national banks unfavorably. *People v. Weaver*, 100 U. S. 539. And by "other moneyed capital" is meant capital in a like enterprise, rather than invested

in corporations of some other character, such as insurance companies, express companies, telephone companies and the like, and coming in competition with national banks. This question is fully discussed in *Mercantile Nat. Bank of New York v. Mayor, etc., of New York*, 121 U. S. 138 (30 L. Ed. 895), where Mr. Justice Matthews says: "The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of bank-

ing. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy.

“Applying this rule of construction we are led, in the first place, to consider the meaning of the words ‘other moneyed capital,’ as used in the statute. Of course it includes shares in national banks; the use of the word ‘other,’ requires that. If bank shares were not moneyed capital, the word ‘other’ in this connection would be without significance. But ‘moneyed capital’ does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporations, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

"So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities

payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

“The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank v. Britton*, 105 U. S. 322, *supra*: ‘The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.’ ”

Other decisions reach the same general conclusions, though clothed in somewhat different language, and their cita-

tion is unnecessary. Accepting the definitions quoted, can it be said that deducting U. S. bonds and stocks otherwise assessed from the property to be assessed to private banks is to discriminate in their favor as against the shareholder of national banks? In *People v. Commissioners*, 4 Wall. 244 (18 L. Ed. 344), the point was touched and the court, speaking through Mr. Justice Nelson, said:

“It is argued that the assessment upon the shares of the relator is at a greater rate than that of the personal property of individual citizens, upon the ground that allowance was made on account of United States securities held and owned by them, when at the same time the deduction was disallowed to him. The answer is, that upon a true construction of this clause of the act, the meaning and intent of the lawmakers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen *which is subject or liable to taxation*. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens. This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the state who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that, in every well regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform. The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had

been so held by this court, and, for abundant caution, had passed into a law.

“The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation, and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions and think a sound construction of the clause and one consistent with its words and intent, is also consistent with all the acts of Congress on the subject.”

The question was exhaustively considered in *Exchange National Bank v. Miller*, 19 Fed. R. 372, and after reviewing the authorities the court said:

“By Sec. 2759, Rev. St. Ohio, the county auditor is required to allow to every individual banker and to every unincorporated bank, in addition to the credits allowed in the valuation for taxation of national bank shares, ‘the average amount of United States government and other securities that are exempt from taxation,’ held by such banker or unincorporated bank. Wherefore, it is argued that the taxation upon the national bank shares is in violation of the first restriction imposed by Congress, in that it is ‘at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.’ No complete definition of other ‘moneyed capital’ has been given. It must, however, be held to mean other taxable moneyed capital. Otherwise, the law of Congress, permitting taxation of the shares, would defeat itself, for they could not be taxed at a greater rate than individual investments in United States bonds, which are

exempt. Unincorporated banks and individual bankers can be taxed only upon their property. The statement they are required to make and return to the auditor shall, the law says, set forth not only their taxable property, but also United States bonds and other non-taxable securities held by them. The auditor is required to deduct from the statement so made and returned that which the state has no power to tax. The statute creates no exemption. It lays hold upon every item of property which it can reach, and taxes every item which it can tax, allowing only the credits allowed to other individual taxpayers. The auditor, accordingly, in fixing the amount for taxation, deducts from the statement, which the law compels the unincorporated bank and the individual banker to make, the securities which the state could not tax if it would. If it were material to inquire why the law requires that non-taxable securities shall be included in the return, the answer might be suggested by Secs. 139 and 1522 of the Revised Statutes of Ohio, relating to the statistical duties of the secretary of state and of assessors. Every taxpayer is required, at the time of listing his property, to make to the assessor a verified statement, which shall include, among other things, 'the amount of United States bonds owned, the amount of legal tender notes or money exempt from taxation, and the amount of state bonds or certificates. As the unincorporated bank and the individual banker make their returns to the auditor, it is provided that those returns shall contain the items which the assessor, in the discharge of his statistical duties, is required to take from every individual taxpayer.'

"Unless the taxation on the shares in national banks is indirectly a tax on the property of the bank, there is no discrimination in favor of the individual banker and the unincorporated bank. But in *Van Allen v. The Assessors*, 3 Wall. 573, the Supreme Court of the United States decided that 'the tax on the shares is not a tax on the capital of the bank.' "

It is clear enough under these decisions that deducting U. S. bonds from property of the private bank in assessing its property involved no discrimination against shareholders of national banks. All the shareholder can demand is that his shares be taxed at the same rate as the property of the private banker. The bonds are non-taxable, and reference certainly could not have been to these in exacting equality. The discrimination is prohibited as to property which may be taxed, and there is none under the state statutes between that on the shares and property of the private banker which may be taxed. Nor does such discrimination result from the deduction from property assessed against the private bank of stock otherwise taxed. It is not pretended that as "otherwise taxed" the tax thereon is not equal to that levied against shares of stock issued by national banks, and the criticism is not that taxation is not equal, but that the stock in other corporations is not twice subjected to taxation. An intention that government bonds shall be taxed when declared by law not to be taxable, or that stocks shall be twice taxed, is not imputable to Congress or to the state legislature, and to obviate this is the purpose as well as the effect of the provisions for their deduction from the property of private banks. The property of the private bank is necessarily assessed to the owner thereof, as are the shares of national bank stock, and the rate of taxation thereon is the same. That government bonds may not be taxed does not affect this rate, nor does the circumstance that other stocks otherwise taxed are not assessed against the bank establish the fact of discrimination. As observed in *First National Bank v. Chapman*, 173 U. S. 205 (43 L. Ed. 669), "That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached."

By treating shares of national bank stock as distinct

entities or items of property, little difficulty is experienced in reaching the conclusion that no discrimination, such as is prohibited by Sec. 5219 of the Revised Statutes of the U. S., is effected by Chapter 63 of the Acts of the 34th General Assembly (*National State Bank v. The Mayor & City Council of Burlington*, 119 Iowa 696), and the judgment of the district court in so ruling has our approval.—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

D. L. PASCAL et al., Appellants, v. PATRICK DONAHUE et al.,
Appellees.

WATERS AND WATERCOURSES: Depressions—Right to Tile—No

- 1 **Presumption of Increased Flowage.** An owner of land may tile his land into natural watercourses or depressions thereon (Sec. 1989-a53, Sup. Code, 1913), and no presumption will be indulged that such tiling either increased the flowage on the lower estate or cast water thereon in any different manner than formerly. Such facts must be made to affirmatively appear.

WATERS AND WATERCOURSES: "Watercourse" Defined. If the

- 2 surface water in fact uniformly or habitually flows off over a given course having reasonable limits in width, the line of its flow is, within the meaning of the law applicable to the discharge of surface water, a "watercourse."

WATERS AND WATERCOURSES: Ditches—Right to Restore Nor-

- 3 **mal Condition.** A landowner may, in some cases, fill up a ditch on his premises to the extent of restoring the ground to its normal level, but if the landowner had such right, he was fully protected when the decree granted him the right to maintain his existing embankment provided he maintained the proper outlet through the same.

Appeal from Clinton District Court.—HON. A. P. BARKER,
Judge.

FRIDAY, MAY 14, 1915.

SUIT to enjoin interference with the plaintiffs' fences,

roadway or embankment. On hearing, the petition was dismissed. Plaintiffs appeal.—*Affirmed*.

Ellis & McCoy and *Pascal & Pascal*, for appellants.

Wolfe & Wolfe, for appellees.

LADD, J.—Plaintiffs are owners of the S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 9, and also the W. $\frac{1}{4}$ of that section, and the E. $\frac{1}{4}$ of section 8. The defendants own the N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of section 9, and the N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of section 16, and the E. 20 acres of the N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of that section. The natural drainage from quite a large body of land from the north is over the N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 9, and through a swale extending therefrom to an artificial ditch in the forty below, that is, the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section, belonging to plaintiffs. This ditch extends from Clear Creek north to within three or four rods of the division line between the forties. The owner of the land below excavated the ditch from the creek to the south line of plaintiffs' forty, and their father from thereon north. This was done in 1884, and the ditch has been maintained since that time. From the upper end of the ditch, north several rods into the defendants' forty, defendants contend that there is a natural swale or depression variously estimated to be from ten inches to two feet in depth and several feet in width; while plaintiffs claim that this is merely the low center of a swale fifteen or twenty rods wide, and was sodded all the way.

The weight of the evidence is to the effect that there was a natural depression through which the water passed over into the artificial ditch, but that the bottom was covered by grass until tile drains were laid in defendants' land in 1909, after which it was gradually removed by the action of the water and because of the turning of a furrow from near the mouth of the tile drain to the division line.

1. WATERS AND WATER-COURSES: depressions: right to tile: no presumption of increased flowage.

About eight hundred rods of tile were laid in defendants' forty acres, with three branches flowing into this swale, one six-inch tile from the north and a five-inch tile from each side. No surface water was drained through the ditch which did not have for its natural outlet the swale running therein, and the tile openings were at the surface.

The record is without any evidence that these tile drains gathered more water or threw it on the plaintiffs' land differently than before these were laid, and such an inference cannot be supplied by theories. *Plagge v. Mensing*, 126 Iowa 737. The furrow may have tended to collect the water and have increased the erosion. At any rate, at the time suit was instituted, we are satisfied that there had become a sort of a mudhole or cattle wallow north of the line, and that a well-defined waterway had been cut from there south emptying into the artificial ditch. Thereafter, plaintiffs could not well cross with their machinery, and they constructed a dam or roadway south of the division line and parallel therewith, about ninety feet long by twelve or fourteen feet wide, with plank along the south side, with spillway, and a seven-inch tile through it. The tile was so placed that it did not carry off the water, and the effect of the dam was to hold the water back on defendants' land at least to the top of the tiles; whereas, prior thereto, the water had passed from the tile drains down through the artificial ditch in plaintiffs' land.

These are but conclusions with reference to the facts upon an examination of the record, and we shall now take up the questions raised by appellants.

I. Was there a natural depression or ditch from defendants' line to the artificial ditch in plaintiffs' land, or was the connecting ditch caused by the acts of plaintiffs? This inquiry has already been disposed of. We are satisfied that there had been a natural depression easily to be identified, indicating the natural flow of the water from defendants' land to the head of the artificial ditch since the excavation of the

2. WATERS AND
WATER-
COURSES:
"watercourse"
defined.

latter; but that since the laying of the tile, either owing to that or the furrow or the making of the cattle wallow, a defined waterway had been cut through the sod at the bottom of such depression. There was a regular watercourse prior to the laying of the tile (*Jontz v. Northrup*, 157 Iowa 6), and the effect produced by the subsequent erosion of the waters did not render it other than that. Under Sec. 1989-a53, Code Supplement, defendants had the right to empty their tile outlets into this watercourse. *Miller v. Hester*, 167 Iowa 180; *Obe v. Pattat*, 151 Iowa 723, 727; *Dorr v. Simmer-son*, 127 Iowa 551; *Parizek v. Hinek*, 144 Iowa 563.

The right so to do is so clearly vindicated by these authorities that nothing need be added even to show that counsels' suggestion, that tiling along a watercourse alone is contemplated by the above statute, is without foundation.

II. The second inquiry is whether, such a ditch having been washed out, the plaintiffs were authorized to restore the earth and raise the ground to its natural surface. Doubtless

8. WATERS AND
WATER-
COURSES:
ditches: right
to restore
normal condi-
tion.

this may be done in a proper case in the interest of good husbandry. See *Horton v. Sullivan*, 56 N. W. (Mich.) 552. Such was not the purpose in the case at bar; but even if it were, the decree fully protects the plaintiffs by ordering that "If they desire to maintain an embankment or roadway across the ditch or swale at the place in question, may do so, provided they lay tile of sufficient size in the proper place, and so placed as to carry off the water, and permit it to flow, as it did prior to the time of the construction of the embankment in controversy, and they are also to keep said tile open and free for the passage of the water," and that if they do not, within forty days the embankment be removed. There is no evidence as to the extent of the cut since the laying of the tile, and therefore the court was warranted in assuming that this was not an appreciable amount more than that which would naturally occur,

and the effect of the decree is to restore the waterway to its normal condition.

Appellants' third proposition has been disposed of in saying that there was no proof of an increased flow of water in consequence of the laying of the tile.—*Affirmed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

DOUGLAS ROY, Admr., Plaintiff, Appellee, v. SUSAN DUFF, Defendant, Appellant.

BILLS AND NOTES: Naked Possession by Stranger—Presumption of Ownership. The mere naked possession of a negotiable instrument payable to order, without any evidence of indorsement, assignment, delivery or gift, is not prima-facie evidence of ownership *against the payee* or his representative.

PRINCIPLE APPLIED: A deceased was admittedly, at one time prior to her death, the owner of several negotiable instruments payable to her or to her order. After her death, the instruments were found in the possession of a stranger to the note, who claimed ownership under a gift from the deceased. The administrator brought action in replevin for the possession of the instruments, claiming that the deceased was the owner thereof at the time of her death. On the trial, the administrator established ownership in the deceased at the time the instruments were executed, that he had made demand on the defendant for the surrender of the instruments, and rested. The defendant introduced no evidence of delivery or gift to her, claiming that the law raised the presumption from her mere possession that she was the owner. *Held*, the law under such circumstances would indulge no such presumption against the payee or her representative, but would presume the contrary.

Appeal from Madison District Court.—HON. W. H. FAHEY, Judge.

FRIDAY, MAY 14, 1915.

ACTION by an administrator to recover the possession of certain negotiable paper issued and made payable to plaintiff's intestate, against one who claims to be the owner by gift, and

rests his right to the possession and ownership of the note upon the mere evidence of possession. Judgment for the plaintiff in the court below. Defendant appeals.—*Affirmed*.

J. P. Steele, A. W. and Phil R. Wilkinson, for appellant.

John A. Guher, for appellee.

GAYNOR, J.—Plaintiff is administrator of one Margaret Bennett, who died in the month of July, 1913. This action is brought to recover the possession of five certificates of deposit and of one promissory note. At the time this action was commenced, these certificates and the note were in the possession of the defendant, Susan Duff. The plaintiff prayed that the defendant be required to turn them over to him as administrator. Susan Duff, answering, admitted that at one time Margaret Bennett was the owner of the note and certificates, but denies that she was the owner at the time of her death. Admits that the certificates and note are in defendant's possession, but alleges that they were given to her by Margaret Bennett. Upon this issue, the case was tried without a jury, a judgment rendered for the plaintiff, requiring the defendant to surrender to plaintiff, administrator, the certificates and note. From this judgment, defendant appeals.

The evidence in this case is very brief.

W. J. Cornell testified as follows: "I have been the cashier of the Citizens' National Bank for more than twenty-five years, and still occupy that position. I knew Margaret Bennett in her lifetime. On the 28th of April, 1913, the Citizens' National Bank issued a certificate of deposit to Mrs. Bennett for eight hundred dollars. Margaret Bennett is now dead and the certificate of deposit has not been paid. On the 26th of September, 1912, the Citizens' National Bank of Winterset, Iowa, issued a certificate of deposit to Margaret Bennett for five hundred dollars which has not been paid. Said Citizens' National Bank also issued a certificate to Mar-

1. **BILLS AND NOTES : naked possession by stranger : presumption of ownership.**

garet Bennett for nine hundred dollars on the 27th day of November, 1912, which has not been paid. On March 26, 1913, the said Citizens' Bank issued a certificate for six hundred dollars to said Margaret Bennett, now deceased, which has not been paid. On April 28th, 1913, the said Bank issued a certificate to Margaret Bennett for six hundred dollars which has not been paid. There was a certificate issued on the 28th day of April for eight hundred dollars which has not been paid. None of these certificates has been paid by the Bank."

W. I. Rhyno testified: "I have been acquainted with Margaret Bennett during her lifetime. Exhibit 'F' is a note that my wife and I executed to Margaret Bennett for corn and hogs off the farm of Frank and Margaret Bennett's. The note has not been paid."

Upon the trial, these certificates of deposit and the note were produced by defendant on request of plaintiff, and were introduced in evidence, and are the certificates and note in controversy. This is all the evidence.

From the evidence and the admission in the answer, it is apparent that the certificates in question were issued and payable to Margaret Bennett; that they were issued as evidence of deposits made by her in the bank, and were payable to her or her order; that the note was executed and delivered to Margaret Bennett as evidence of an indebtedness from the maker to her; that this note was payable to her or her order.

The defendant admits that Margaret Bennett was, at one time, the owner of these certificates and claims that, prior to her death, Margaret Bennett gave them to her. She had them in her possession at the time demand was made upon her for them, and at the time this suit was commenced.

At the conclusion of all the testimony hereinbefore set out, defendant moved for judgment, basing his motion on the ground that the evidence was wholly insufficient to justify judgment for the plaintiff.

There is no claim that the notes were endorsed in blank
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or otherwise by Margaret Bennett. Nor is there any evidence of any assignment in writing or otherwise of the note by Margaret Bennett to the defendant. Nor is there any evidence of any delivery or gift of the note and certificates by Margaret Bennett to the defendant. The only question is, therefore, was the possession of the note and certificates by Susan Duff, under the circumstances, such evidence of ownership as entitled her to have a judgment in her favor, as against the showing made by the plaintiff? Or, in other words, was the showing made by plaintiff sufficient to justify the court in holding that the property and right of possession in the certificates and note were in the plaintiff as administrator of the estate of Margaret Bennett?

Sec. 3060-a16 of the Supplement of 1907 provides: "As between immediate parties, and as regards a remote party other than a holder *in due course*, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; . . . But where the instrument is in the hands of a holder *in due course*, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party *whose signature appears thereon*, a valid and intentional delivery by him is presumed until the contrary appears."

Sec. 3060-a30 provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the *holder* thereof if payable to *bearer*, it is negotiated by *delivery*; if payable to *order*, it is negotiated by *the indorsement* of the holder, completed by delivery."

Sec. 3060-a49 provides: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor."

But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

Sec. 3060-a52, under the head, "What constitutes a holder in due course," provides, "A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

These are the provisions of our law merchant so far as is necessary to consider the statute in its relationship to this case. There can be no controversy under the law that, in an action *against the maker* of a note by a holder, the production of the note upon the trial, in the possession of the plaintiff, is prima-facie evidence of his right to maintain the action. This is the holding in *Yunker v. Martin*, 18 Iowa 143; *Rubey v. Culbertson*, 35 Iowa 264.

The defendant would, as against the maker of the note or certificate, be entitled to maintain an action, and her right would be sustained by the production of the notes upon the trial, and a showing that she was in possession of the same.

The presumption indulged in in favor of the plaintiff against the maker, in a suit upon a note payable to order, not indorsed, is not indulged in in a suit by the legal owner against a stranger to the note, though in possession.

The title to negotiable instruments passes by indorsement. The rule of presumption of ownership in favor of one in possession of personal property does not obtain generally as to negotiable instruments.

The certificates, in themselves, with the admission of the defendant, show beyond controversy this fact. Margaret Bennett was the original owner; she deposited the funds that these certificates represent in this bank; she took these certificates of deposit as evidence of this fact, payable to her own order. She, therefore, acquired a title to these certificates as shown by this record. This title is presumed to continue until it is shown to have been divested, and we take it to be the rule that the mere possession of such paper, without indorsement, where there is no evidence of a consideration paid, and no evidence of delivery except the possession, is an insufficient showing of the passing of title to the defendant.

The general rule is recognized in this state that the possession of personal property is prima-facie evidence of title in the possessor, and casts a burden upon one who seeks to dispossess him of the property to show title and right to do so. The title to personal property generally passes on delivery. Until the contrary appears, the title is presumed to have passed with the delivery, and the person in possession is presumed, nothing further appearing, to be not only entitled to the possession, but to be invested with the title. Delivery is the usual method of consummating a sale. Therefore, from the possession of personal property, a reasonable inference arises that the person is not only entitled to the possession, but is, in fact, the owner of the property. This, of course, is a rebuttable presumption, but, until rebutted, must prevail.

But, in the case of negotiable instruments, where the title passes by indorsement, no such presumption can be indulged in as against a payee named in the note, in the absence of any indorsement, or in the absence of any evidence of a transfer of title from him. The mere possession of a negotiable promissory note or any negotiable instrument, the title to which passes under the law merchant by indorsement and delivery, is not prima-facie evidence of ownership as against the payee. The absence of the indicia of ownership is wanting, and mere possession does not supply this.

Tuttle v. Becker, 47 Iowa 486, was an action to recover the possession of certain promissory notes. The notes were payable to W. H. Becker, plaintiff's intestate, or order. The defense was that the notes were given in consideration of the sale of certain real estate belonging to defendant, and that the intestate was a mere trustee, and although, as such, the notes were made payable to him, said intestate had no interest therein, the notes being the property of the defendant. The only question submitted to the jury was as to the ownership of the notes. They were payable to W. H. Becker, plaintiff's intestate, but were in the possession of the defendant. The trial court, among other things, said to the jury: "The notes in question were executed to W. H. Becker, as payee, but this is not conclusive that he was the owner thereof; it, however, raises a presumption in favor of the plaintiff which the defendant must overcome by evidence to justify a recovery by him." This court said: "As between the holder and maker, it was held . . . that possession of a promissory note was prima-facie evidence of ownership. This ruling, without doubt, is believed to be correct, but the case at bar is materially different. Here the contest is between the payee and a stranger to the note, and in such case the presumption should be indulged in that the fact that the notes were payable to W. H. Becker, created a presumption that he is the owner. If the presumption is the other way and possession is prima-facie evidence of ownership, then the thief or wrongdoer would have the owner at a serious disadvantage."

The case of *Gano v. McCarthy*, Administrator, 79 Ky. 409, is a case right in point. It appears in this case that Samuel Devor executed and delivered his note to one Florence McCarthy. McCarthy died, and, shortly after, Devor, the maker of the note, died. Mary Straughn, a niece of McCarthy, after the latter's death assigned this note for a valuable consideration to R. M. Gano. Tarleton, the administrator of McCarthy, instituted suit against the administrator of Devor's estate to recover the amount of the debt. The administrator of Devor's

estate admitted that the estate was owing the note, but pleaded that R. M. Gano was in possession with a claim to be the owner. Gano interpleaded, and alleged that McCarthy, prior to her death, made a voluntary gift of the note to her niece, Mary Straughn, and that Mary assigned it for full value to him. The court said: "There was no assignment of the note by appellee's intestate to his niece. The only question is, was the possession of the note, under the circumstances, such evidence of ownership as required the jury to pass upon the issue made? We think not. Here was an issue directly made, as to the title and ownership of the note, by the personal representative of the party to whom the note was executed and delivered. It is conceded by the pleadings and shown by the proof that the note was executed and delivered to plaintiff's intestate, and his original title and possession being unquestioned, the burden was on the party claiming the note to show the manner in which his assignor secured title, and the mere fact of possession, upon such a state of facts, was not prima-facie evidence of ownership. That there might have been such a gift of the note, or a verbal sale of it, by the intestate to his niece, as to prevent a recovery by his personal representative, is not doubted, but such a defense must be sustained by the proof, and the law will not presume the existence of such facts from the mere possession of the note by the claimant, as will deprive the owner of title. The presumption is, that the title and right to possession is with the original owner, and the burden is on the claimant to show that his possession is rightful. The party admitted to be the original owner, is not required to show, in addition to the title and possession in himself, that this possession he has been deprived of by the unlawful act of the defendant, but the explanation as to how the claimant derived title and possession is with the latter. If the recognized rule of law, applicable to the ownership of personal property, is to be applied to a due bill or commercial paper in the possession of the party claiming it, still the recovery in this case was properly denied. The possession of personal property

is prima-facie evidence of ownership, but where the party claiming to be the owner establishes his title, and the fact that he was in possession and the party, against whom he is seeking to recover, claims to hold under him, the mere fact of possession by the claimant is not such evidence of the possession's being rightful as will prevent recovery. It would be an easy matter to deprive the owner of property if, in such a case, he were required not only to make his action good by showing title in himself, but must, in some other manner than the exhibition of his title, negative the idea that the possession of the defendant is wrongful."

In *Daniel on Negotiable Instruments*, Sec. 812, it is said: "But the presumption of bona fide ownership [from possession] does not apply where the instrument is not payable to bearer, unless it be endorsed specially to the holder or in blank."

In *Robertson v. Dunn*, 87 N. C. 191, that court said: "The note in suit was never endorsed. The defendant's intestate was the holder, and the plaintiff's intestate had the legal title. The defendant's intestate unquestionably had the right to bring the action upon the note as holder and recover judgment thereon, for when the holder produces the note sued on and offers it in evidence, it raises a presumption of fact that he is the owner, and, unless rebutted by the defendant, entitles him to judgment. . . . But it is a presumption which is only evidence against the *defendant in an action upon the note* and, as a mere presumption, cannot avail the holder in an action brought against him by the legal owner." See also *Holly v. Holly*, 94 N. C. 670, in which the doctrine is recognized that the possession of an unendorsed negotiable note raises a presumption of fact, as between the holder (that is, the one in possession) and the maker, that the holder is the owner, but this presumption does not arise as between the person in possession and the payee who has the legal title.

Vastine v. Wilding, 45 Mo. 89, reported in 100 Am. D. 347, is a case which involves a controversy between the admin-

istrator of the payee in a negotiable promissory note and a stranger to the note in possession at the time of the demand and suit. The court, in passing upon the question, said: "The certificate itself establishes beyond controversy the fact that Berger [the payee] was its original owner; that he deposited the fund, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown; and a mere manual delivery of the paper, without endorsement, and unaccompanied with evidence of a consideration paid, would not, of itself, pass the title." The court further said: "Possession is prima-facie evidence of title when paper is made payable to bearer, as bank notes; or where, if payable to order, the paper has once been properly endorsed and put in circulation." The court propounds this question: "Possession of unendorsed negotiable paper may well be received as prima-facie evidence as against a stranger to the title; but is the naked and unexplained possession of such paper prima-facie evidence as against the payee therein named?" The court answers this question in the negative. See *Robertson v. Dunn*, 87 N. C. 191, in which the Supreme Court of North Carolina recognizes the doctrine hereinbefore set out. See also *Lawson on Presumptions*, Chap. 8, Rule 29, Div. A, page 164.

With the authorities above cited supporting the holding of this court, as announced in *Tuttle v. Becker*, *supra*, we are satisfied that the court below committed no error in entering judgment for the plaintiff. The cause is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. MARK BOSWORTH, Appellant.

APPEAL AND ERROR: Motion for Directed Verdict—Refusal—

- 1 **Waiver of Ruling.** He who moves for directed verdict and suffers an adverse ruling, and thereupon introduces his testimony, must then renew his motion or waiver of the adverse ruling will result; and so, though overruling the motion to direct is one of the grounds of an overruled motion for new trial.

CRIMINAL LAW: Alibi—Erroneous Application. Alibi implies a

- 2 claim on the part of the accused that at the time of the commission of the offense in question he was at some other place and so far distant that he could not have committed it. Applying the doctrine over the objection of the accused, with the usual caution that it should be closely scanned because easily manufactured, to a state of evidence wherein the accused admitted that he was within twenty-five feet of the place where and when the act charged was committed, but denied all participation therein, constitutes reversible error, because (a) without basis in the evidence, (b) misleading the jury to infer that the sole defense of the accused was that he was so far away that he could not have reached the place in question, (c) disparaging and discrediting the entire evidence bearing on his nonparticipation in the act charged, and (d) practically throwing the burden of proof of innocence on the accused.

CRIMINAL LAW: Alibi—Consenting to Improper Application. The

- 3 mere fact that the accused accounts for his whereabouts up to a time shortly before the commission of the offense charged furnishes no basis for injecting the issue of alibi into the case, when the accused admits that he was within 25 feet of the place where and when the act charged was committed but denies all participation therein.

CRIMINAL LAW: Malicious Injury to Property—Essential Allega-

- 4 **tions.** An indictment for maliciously injuring or destroying an electrical apparatus under Sec. 4807, Sup. Code, 1913, should, among other essential allegations, allege (a) the particular apparatus injured, (b) that it was an electrical apparatus, (c) the ownership of said apparatus and (d), if the ownership is in a corporation, the fact of incorporation should be alleged. Proof must meet and sustain the allegations. Proof showing the existence of a corporation *de facto* is sufficient.

CRIMINAL LAW: Corporate Existence—De Facto Existence—Proof

- 5 **—Insufficiency.** Testimony that cars were being operated by the

"Oskaloosa Traction & Light Company," and loose statements disclosing the existence of trolleys, trolley wires, electric power houses, etc., do not establish the existence of a *de facto* corporation or the ownership of any property.

CRIMINAL LAW: Conspiracy—Accessory—Approval and Inaction

- 6 Only. It is correct for the court to charge that defendant may be convicted though he did not actually participate in the consummation of the offense charged, provided it be shown beyond a reasonable doubt by proof, direct or circumstantial, that the offense was consummated by others in pursuance of a conspiracy in which defendant was a party. It is reversible error for the court to refuse to amplify such instruction, when requested by the defendant, by clearly embodying the thought that defendant cannot properly be convicted from the mere fact that he witnessed the unlawful acts, even approved of them, remained silent and made no effort to stop them.

PRINCIPLE APPLIED: In instant case, the requested instruction was that in order to convict it must be shown: "That he met at said place, in accordance with a common design or appointment with the alleged persons unknown, for the purpose of destroying the property of the street railway company, and that although he may have been in sympathy with the acts of the rioters, he is entitled to acquittal unless he aided in what the rioters did."

CRIMINAL LAW: Malicious "Injury" or "Destruction"—Variance.

- 7 Under a charge of maliciously "removing and destroying" a street car (Sec. 4807, Sup. Code, 1913), a conviction cannot be supported on evidence of a mere "injury."

CRIMINAL LAW: Trial—Reception of Evidence—Failure to Object

- 8 —When Considered on Appeal. Where an error has not been sufficiently excepted to in a criminal case and there is to be a retrial because of other errors, the error insufficiently excepted to will be considered on appeal for the purpose of directing the proper course on retrial.

CRIMINAL LAW: Good Character—Effect on Question of Guilt.

- 9 The law makes no attempt to specify just what effect, as a matter of law, shall be given to evidence of previous good character, but leaves its value as defensive evidence in any given case to be determined by the jury. Therefore a requested instruction to the effect that such evidence is sufficient to overcome the evidence of guilt, where the evidence is not convincing and of such a nature as to exclude a reasonable doubt of his innocence, is properly refused.

CRIMINAL LAW: Defining Terms—Necessity for—“Remove.” It is not necessary for the court to define the word “remove.” So held under a charge of maliciously removing a street car. (Sec. 4807, Sup. Code, 1913.)

Appeal from Mahaska District Court.—HON. JOHN F. TALBOTT, Judge.

FRIDAY, MAY 14, 1915.

INDICTMENT charging defendant with maliciously and unlawfully injuring, removing and destroying a street car belonging to an electric railway, to wit, the Oskaloosa Traction & Light Company, of Oskaloosa, Iowa. Defendant was convicted and appeals.—*Reversed and Remanded.*

Davis & Orvis, for appellant.

D. W. Hamilton, John McCutchen, George Cosson, Attorney General, and *Wiley S. Rankin*, Special Counsel, for appellee.

SALINGER, J.—I. Error is assigned on the overruling of defendant's motion to direct a verdict. The motion was made at the close of the testimony for the State, and after its overruling, the defendant introduced his testimony. The motion was never renewed. In this state of the record, we cannot review the assignment. This is so despite that the motion for new trial asserts that the motion to direct verdict should have been sustained.

II. The acts upon which the indictment was based were committed between 11:15 at night and midnight. Earlier the same evening, the defendant was about town and attended the theater. He arrived at the scene of the alleged crime about 11:15. There is testimony that he then participated. On the other hand, he contends that he remained on the sidewalk, some 25 feet from the participants. Over his objection, the court charged (instruction No. 6) that the defense of alibi

1. APPEAL AND ERROR: motion for directed verdict: refusal: waiver of ruling.
2. CRIMINAL LAW: alibi: erroneous application.

was being made, and that defendant claims to have been so far away that he could not with ordinary exertion have been present at the commission of the crime charged. The burden is put on defendant to prove this defense, with the proviso that, if the evidence on the alibi, with all the other evidence, raises a reasonable doubt, there should be an acquittal; and the jury is told that this is a defense which is easily manufactured, and should, therefore, be scanned with care and caution. The objection of the defendant was, in effect, that he claims no alibi; that he concedes that he was present where he could have done what he is accused of doing, but did not. He urges that, while the instruction may be abstractly correct, it has no basis in the record and was prejudicial, and that the underscoring therein of the word alibi was an additional error, as well as an aggravation of the error committed in giving the instruction at all.

The State responds that the sole objection is to the instruction as a whole; that it is not well taken because defendant concedes the instruction to be applicable to the evidence concerning his doings before 11 o'clock; that by putting in such evidence, he himself injected alibi into the case; and that against this, it is not controlling what label the defendant puts on the defense which he did make, nor what he claims for it. It is further said that the instruction given is uniformly approved by many of our decisions, and that there is nothing irregular about it, unless it be the underscoring of the word alibi, and that, if the instruction is warranted, the underscoring of this word cannot be error.

1. Proceeding by way of elimination, we have to say we find nothing in the record to sustain the claim that defendant consented to the giving of the instruction so far as it relates to earlier than 11 o'clock. He objected to its

3. CRIMINAL
LAW: alibi:
consenting to
improper ap-
plication.

giving, on the ground that he was not claiming an alibi. This objection is *in toto* and upon a ground which eliminates the theory that the instruction is conceded to be applicable to some phase

of the evidence. The testimony covering the time up to 11 o'clock is relevant to defendant's denial that he was in a conspiracy and interested in what his co-conspirators were doing in his absence; and as such testimony had bearing upon something other than alibi, the naked fact of its presentment does not create a volunteer issue, nor operate as a consent to instruct upon alibi. Abstractly it is true that what defendant claims his defense is does not settle what defense he actually interposes. Yet the fact that at the time the instruction was given he asked that it be withdrawn, on the ground that it presented a defense not claimed by him, has the twofold effect of bearing upon what defense was actually interposed by him and on whether he voluntarily presented an alibi for decision.

We agree that, if there was warrant for instructing on alibi, the underscoring of the word alibi is of no consequence, and agree that the charge was one of approved form. But it does not follow that it is material that such instruction is in approved form. If there was no evidence to base the instruction, it cannot be defended though it was in proper form. We thus reach the real question on this head,—whether there was any evidence which warranted the giving of this charge, and whether, if it was unwarranted by the record, its giving was prejudicial.

2. The theory of the State is that, as defendant claims he "was 25 feet away and no closer," he so asserted that it was "physically impossible for him to have participated in the identical crime from his location"; that this presents the defense of alibi as much as though he had remained 500 feet away; that the size of the distance, if not wholly immaterial, is not controlling, and that the following authorities sustain this contention: 2 Am. & Eng. Enc. of Law, page 53, and foot-note, states, in effect, that alibi "literally" means "elsewhere" and that the defendant or person accused was in a place which "precludes the idea that he was the perpetrator." The cases cited in support of this text are: *Hardin's* case

46 Iowa 623, 628, in which it is charged there must be proof of where defendant claims to have been at the time the crime was committed, all the time during its commission, or at such time that he could not, with any ordinary exertion, have reached the place of committing. The correctness of this is not passed upon, and the decision turns entirely upon "the degree of proof of an alibi which must be produced to entitle defendant to an acquittal," and the requirement that the jury should be "fully satisfied by a preponderance that these defendants were situated as is above stated" is held to demand too great a degree of proof. In *Fry's* case, 67 Iowa at 478, there is again no decision on what is the law concerning distance. The only point ruled is that the degree of proof is correctly stated. *Maher's* case, 74 Iowa 77, also holds that the charge on degree of proof is correctly stated. For the rest, it is a decision that the court has discretion as to order of proof on alibi.

Aside from this support for this text, there is *Child's* case, 20 Pac. 275 (Kansas), wherein it was charged that the proof must show that participation was "practically improbable or impossible." Whether this is correct is not touched. And the decision is merely that it was error to charge that defendant had the burden of proof on this.

Peyton's case, 54 Neb. at 190, holds that, while being at some distance from the alleged place of commitment is "necessarily elemental" in proof of alibi, yet "the distance disclosed by the evidence is not always an absolutely controlling fact"; that the distance itself bears merely on the strength of the defense, and it is error to require that "the distance must be such as to preclude any possibility of a participation in the crime",—all of which means merely that the jury must sustain the alibi if it believes defendant was so far away as to make participation impossible, and may sustain it, though the evidence that the distance was so great as this is less conclusive

and is such as to leave the impossibility of participation a debatable question.

In *Gulliver's* case, 163 Iowa 123, an instruction does charge that the testimony in support of an alibi must show that defendant was so far away that he could not be present at the scene of the crime. But the only thing decided is that instructing that such testimony "is entitled to weight" constitutes a departure from the correct rule, which is that, instead of being merely entitled to weight, such testimony may work an acquittal, if, in connection with all the testimony, it raises a reasonable doubt. In other words, the case assumes that what is required to be proven is correctly stated, criticizes the instruction because it, standing alone, fails to make clear what consideration such testimony is entitled to, and decides also that this fault is cured by other parts of the charge.

The utmost that can be claimed for all this is that one showing as to distance may settle conclusively that the defendant could not have participated, another may establish conclusively that the distance shown is insufficient to sustain an alibi, and, third, that the showing as to distance may be such as to leave it a question for the jury whether an alibi is made out. We are therefore brought to deal with the question at bar unaffected by the citations made for the State, and to consider its contention in the light of adjudications other than the ones cited by it, and in the light of reason.

3. It is urged upon us that, while defendant does not deny that he was near the scene of action at the identical time when the offense occurred, "what he does claim is he was 25 feet away and no closer"; that his claim of a "physical impossibility" to have reached the place of commission refers to "the possibility of reaching out and touching the car from the identical place where the defendant was standing." It is illustrated that one might see something occur while "three blocks" distant, or see an occurrence while stand-

ing but a "few feet away and the elements of alibi involved would be the same"; that one might be in a room adjoining, with the door closed, and at a distance of but a few inches; and that, while "in both of these instances the 'physical impossibility' would vary," it is the claim of the State "that the defense would be alibi because at the identical moment when the crime was committed, it was physically impossible for the defendant to participate in that identical crime from his location"; and that this "does not mean that if there were sufficient time defendant could not walk to the place where the offense was committed." The ultimate statement of the State is that a claim by defendant that he "was so far away that it was physically impossible for him to reach out and touch the car" asserts an alibi, and "that 25 feet was as sufficient as 500 feet would be in the matter of an alibi."

II. When the plea of not guilty is entered, the State must prove guilt, but the defendant may fortify his plea of not guilty by evidence. In many cases, such evidence is that, while he was not prevented by distance from committing the act charged, yet he refrained from doing so. This very often involves the claim that accused did not come into physical contact with somebody or something. In every case wherein it is defended that accused did not commit an assault though nothing prevented his committing it, it is claimed, of necessity, that the hands of defendant did not touch the body of his alleged victim. One accused of having struck a blow with his fist, who admits that he was within five feet of the person struck and asserts that he was never closer, denies physical contact. On the theory of the State, each of these is the defense of alibi. The practical effect would be to shift the burden of proof in such cases and to relieve the State from overcoming the plea of not guilty. Say the charge is rape, and defendant admits he was where he could have committed the act, but insists that he at no time went closer

to the prosecutrix than four feet. It would seem that the State is not entitled to a conviction unless it proves beyond a reasonable doubt that this claim is false; or, in other words, proves that there was a time when defendant got closer than that. Were we to sustain the contention of the State, then, while it would remain its burden to make this proof beyond a reasonable doubt, it would at the same time be the duty of the defendant to prove by a preponderance that his claim as to distance maintained by him was true. Were we not committed to the rule that defendant has the burden of proof on alibi, it might do no substantial harm to accede to this rather startling theory. But we do put the burden of proof on the defendant. And the result would be that, while the State retains the burden of proving him guilty, his evidence that he did not touch the person upon whom he is charged to have committed the violent assault would, by the simple method of terming it evidence to support an alibi, be sent to the jury with direction to review it with care and caution, and to treat it as supporting a defense which might be easily manufactured.

In *State v. Lindsay*, 152 Iowa 403, 405, the charge was that the defendant had ravished a little girl, having taken several children, including the prosecutrix, on trips in his auto. The testimony was that he was met on these several trips, and the time of meeting was fixed between five and six o'clock in the afternoon. According to the story of the prosecutrix, one of the first persons she saw after the defendant left her was a Mrs. Marquis, and the latter fixed this time as being 5:30 in the afternoon. An instruction involving alibi was complained of for having no basis in the record, and this contention was sustained, and the court said:

"The only evidence pointed out to us by the State in support of these instructions is the evidence of a witness for the defendant, who fixes the time of defendant's return to Prairie City at five minutes before six. The prosecutrix testi-

fied that when she saw Mrs. Marquis it had been fifteen minutes or less since the defendant left her. The exact distance from Colfax to Prairie City does not appear, but it is a near-by town in the same county, and there is no claim made on either side that the distance could not have been traversed within a half an hour. We find nothing, either in the defendant's testimony or in that of the witnesses in his behalf, which can be said to present the defense of alibi. On the contrary, the testimony of the defendant himself was that he did take the little girl riding at or about the time she says he did. He does not claim that it was physically impossible for him to have perpetrated the crime because of distance separating him from the prosecutrix. He concedes his presence with the little girl at or near the time of the alleged crime, but he denies that he perpetrated any crime upon her."

This is a full recognition of the distinction we are pointing out. The defense of alibi, which casts certain burdens upon the defendant, is an affirmative defense which asserts that distance made it impossible to commit the crime. What was done here amounts to a denial of guilt, with the concession that no distance or other physical cause made it impossible, or even improbable, that defendant committed the offense. It amounts to a plea of not guilty, and the defendant is not bound to prove its truth, nor should his testimony in support of such plea be disparaged.

In *Lindsay's* case, the charge as to alibi defined the same to be "that at the time of the commission of the alleged offense with which he was charged he was at a different place so that he could not have participated in its commission." In the case at bar, the charge is, "it must be shown at the very time of the commission of the crime alleged, if one was committed, the accused was at another place so far away, or under such circumstances, that he could not with any ordinary exertion, have reached the place where the crime was committed, so as to have participated therein." We are

unable to see any difference in the two instructions which dictates that we should not reach the conclusion announced in the *Lindsay* case.

That the instruction now in review was prejudicial is manifest. Even in a civil case, the giving of an instruction which has no basis in the evidence is error. To say nothing of the presumption of prejudice which arises from the fact that the charge given was erroneous, this record makes an affirmative showing of prejudice. In the first place, its tendency was to lead the jury to infer that the only defense was that defendant was so far away that he could not have reached the place where the crime was committed. At the least, some of the attention of the jury which should have been expended upon matter that should have consideration was devoted to this point. There is the additional prejudice pointed out in the *Lindsay* case, "The instructions upon this subject placed him and his defense in a false light before the jury. The findings of the jury would necessarily be adverse to such an alleged defense. There was no testimony on either side from which an alibi could be found, in the sense in which that term is used in criminal cases, and in which it was defined by the court."

What is even more prejudicial is what we have repeatedly dwelt on: that the testimony which defendant adduced to fortify his plea of not guilty was sent to the jury under disparagement, with direction to scan it carefully, to be cautious in giving it weight, and further, that it was for defendant to show, by a preponderance, that his testimony was true.

It is none too clear what is meant by the rule which puts the burden as to alibi on the defendant, and makes his testimony on alibi available in aid of creating a reasonable doubt which, if entertained, effects a holding that the State has not met its burden. This distinction we have herein pointed out tends to help clear the tangle. A denial that defendant participated leaves the burden on the State. If coupled with

the denial there be a claim that the evidence shows the defendant was too far away to have participated, an acquittal can be had upon that affirmative defense alone, but only if defendant proves such defense. That he fails to prove it does not excuse the State from proving beyond a reasonable doubt that he is guilty, and though the affirmative defense fails, as such, the evidence adduced in its support may make a reasonable doubt as to the guilt of defendant. But whatever is the true line of adjustment of these burdens of proof, the burden of the State, to prove the defendant guilty, may not be shifted, in whole or in part, by insisting erroneously that defendant is interposing the defense of alibi.

The *Lindsay* case finds that substantially what is done here constitutes manifestly prejudicial error, and we cannot escape from reaching the same conclusion here.

III. Sec. 4807 of the 1913 Supplement to the Code makes it a felony to injure, remove or destroy any electric railway or apparatus thereto belonging. The indictment follows the

language of the statute, and charges the defendant with committing the crime therein prohibited, in that he maliciously and unlawfully injured, removed and destroyed a certain apparatus belonging to an electric railway of the Oskaloosa Traction and Light Company of Oskaloosa, to wit, a street car. The defendant urged below, and now insists, that the verdict is without support in the evidence because there is no competent testimony that the company named in the indictment exists, nor that it is an electric railway, nor that it had the right to own cars, nor that it did own any.

The State says it is not "absolutely essential" to prove the ownership of the car. The authorities cited by defendant, claiming that the rule which requires the proof of needless allegation in indictment applies here, need no consideration. For it seems to us that both the statute and the indictment make it necessary that there should be proof: first, that there was an electric railway of the name stated in

4. CRIMINAL
LAW: ma-
licious injury
to property:
essential alle-
gations.

the indictment; second, that defendant did what the indictment charges concerning some apparatus belonging to such a company. This, too, was the theory of the trial. By instructions three, twelve and fourteen, it is made one of the elements necessary to a conviction that the unlawful acts charged were done upon street cars which were a part of the apparatus "belonging to the electric street railway of the Oskaloosa Traction and Light Company," of Oskaloosa, Iowa—and they rule the law.

2

The claim of defendant that, on the charge of larceny, it must be proven that the stolen property belonged to an individual company, partnership or corporation, and belonged to someone other than defendant, is indisputably sound, and the many citations in its support are unnecessary. Nor is the rule limited to larceny. Whenever a statute so describes an offense that it cannot be committed unless the property affected by the offense belongs to someone other than the defendant, the ownership of that other must be alleged and proven as alleged. *Whittier's* case [State v. Whittier], 21 Me. 341. So, for instance, where the unlawful killing of an animal is prohibited when done in an enclosure surrounded by a lawful fence, there must be an acquittal if the proof fails to disclose the existence of such enclosure. *Deal's* case [State v. Deal], 92 N. C. 802. This case does not differ in principle from the one at bar. Even as the charge of killing within an enclosure surrounded by a lawful fence lacks proof to sustain the conviction unless it is shown that the enclosure was so surrounded, so is there fatal failure of proof if, on prosecution under a statute for injuring an apparatus "belonging to an electric railway, there is no proof that there is such company in existence, and that the property injured belonged to it.

Cases may and usually do differ in facts, but such difference does not preclude evolving a rule from them. So, here,

none of the cases we consider are exactly in point in the sense that their facts are the facts at bar. Yet they make clear that alleging and proving ownership in someone other than defendant is essential under the indictment before us.

In *Kelley's* case, 206 Mo. 685, the ownership was laid in a corporation. It was held that the fact of incorporation should be alleged, and that this was necessary, though the existence of a corporation *de facto* will sustain the charge; and as nothing is to be left to intendment, defendant is entitled to know whether the state intends to show ownership in individuals, in a firm composed of individuals, or in a corporation. It has been held that in larceny it may be proved by general reputation that the owner is a corporation. *Thompson's* case, 23 Kans. 338. And so on a charge of uttering a counterfeit note. *Reed's* case, [*Reed v. State*], 15 Ohio 217; *Ah Sam's* case, 41 Calif. 645. On forgery of a draft of a mining company, testimony that witness was president of the company, and found the forged draft with its vouchers, was held sufficient proof that the company was a corporation *de facto*. *Frank's* case, 28 Calif. 507. And so of testimony that the company known by the name given in the indictment was a corporation *de facto*, and doing business as such. *Barric's* case, 49 Calif. 342. In *People v. Hughes*, 29 Calif. 257, defendant was charged with burning a building insured by a duly incorporated company of the name Hartford Insurance Company. A witness testified that he was acting as the agent of the corporation having the insurance, delivered the policy, and that it was received by defendant. It was held that from these facts the jury might well find the *de facto* existence of the corporation. In *Müller's* case, 21 Pac. 1025, the indictment charges that stolen property belonged to a named railroad and that the same is a corporation. The evidence is not set out, but the court says: "Upon a careful review of the entire record in this case, we are unable to escape the

conclusion that the prosecution failed to establish by proof that the property alleged to have been received as stolen goods was the property of the Denver & Rio Grand R. R. Co., as charged in the indictment." The court also said: "It is necessary for the prosecution to prove that the company was *de facto* organized." In *Hawkins v. State*, 20 S. E. 217 (Ga.), the charge was stealing a clock from a schoolhouse. The principal of the school testified that the clock was the property of the city of Atlanta. The witness was asked how he knew the clock belonged to the city, and he said because one S, the superintendent of the school, told him. It was held that this was insufficient proof of ownership to sustain a conviction.

As said, while each and all of these cases differ in their facts from each other and from the case now in consideration, the very fact that each and all of them found it necessary to dispose of the question we are now considering, by holding either that there was or was not sufficient proof on the existence of the alleged owner, or of his ownership, demonstrates, in spite of the varying facts upon which the cases turn, that such proof is deemed vital.

What we have left for decision, then, is not what the law is, but whether the existence of the named company and its ownership of the cars in question is sufficiently supported by the evidence to sustain the conviction here appealed from.

The only direct testimony either of the existence of the corporation named, or that the cars in question were its property, is, first, the testimony of one True that the cars "were being operated by the Oskaloosa Traction and Light Company"; and, second, loose statements disclosing the existence of trolleys, trolley wires, electric power houses, and that trolleys were seen to fly off wires and lights to go out. It is self-evident that this is far from being satisfactory proof that the Traction Company named in the indictment exists, is an electric railway, and is capable of owning

5. CRIMINAL
LAW: cor-
porate exist-
ence: *de facto*
existence:
proof: insuffi-
ciency.

cars, and did own the ones upon which the alleged unlawful acts were done. We are constrained to say this does not satisfactorily meet the standard as to the proof required to sustain a conviction for felony, and that the testimony on this head should not be left in this condition, on re-trial. It should be easy to make proper proof on this vital point. The cases we cite on the proposition that proof is required indicate what is competent proof. After this pronouncement, we may reasonably anticipate that it will be done. In view of this, and of the fact that we reverse on other grounds, we need not and do not put the reversal of the conviction appealed from on the condition of the evidence on existence and title.

IV. The only evidence for which it might be claimed that it establishes *any* conspiracy in which defendant participated is: first, that he witnessed the riotous acts, remained silent, and made no effort to stop them; and, second, the testimony of one witness, denied by several, that defendant stated concerning a car (the character and ownership of which is not disclosed) which was loaded on a freight car near the M. & St. L. depot, "Let's go down and burn the son of a bitch." The witnesses, other than the one, say the statement of the defendant was a proposal to go down and protect this car. In instructions twelve, thirteen and fourteen the court charged, in substance, that defendant might be convicted though he did not actually take part in the acts complained of, if proof, either direct or circumstantial, establishes beyond a reasonable doubt that the crime was committed by persons unknown, substantially as charged, in pursuance of a conspiracy in which defendant was a participant. Abstractly speaking, the instructions correctly announce the law, and, in the absence of a request that they be amplified, they sufficiently present all the law relevant to the matter charged upon. But defendant was refused an instruction that the mere fact of his being present at the place "should not be adjudged against him," even though he may have acquiesced

6. CRIMINAL
LAW: con-
spiracy: ac-
cessory: ap-
proval and in-
action only.

in the doings of the mob and took no steps to stop same; and that to find him guilty it must be shown, "That he met at said place, in accordance with a common design, or appointment with the alleged persons unknown, for the purpose of destroying the property of the street railway company, and that although he may have been in sympathy with the acts of the rioters, he is entitled to acquittal unless he aided in what the rioters did."

No objection was made below, and none is presented here, that the evidence did not warrant the instruction which the court gave, and we are precluded from going into that question. But even if defendant has waived the right to complain of the fact that this instruction was given at all, he has preserved the right to present here that it should have been amplified as requested. The instructions given did not prohibit the jury from finding the defendant guilty merely because it was found that he was present and remained silent and inactive, or if they believed that he made a proposal to go and burn some car somewhere. We have no way of knowing but that the verdict of guilty rests upon one or both of these matters. "An instruction is erroneous if it authorizes the jury to convict the defendant because of his presence or mere mental approval or consent without requiring that he shall have aided in or encouraged the commission of the crime." 12 Cyc. 616. Mere passive failure to disclose the commission of a crime will not make one an accessory. *Davis v. State*, 130 S. W. 547, 549 (Ark). In *Hicks v. United States*, 150 U. S. 442, a case which appellant erroneously cites for the claim that the court should have instructed more specifically on the definition of aider and abettor, it is, however, held that the mere use of words, the effect of which is to encourage another to commit a crime, does not make the user thereof an aider and abettor unless he intended them to have that effect. We are unable to accede to the claim that instruction number seven "fully gives the defendant all his rights" on this head. It is nothing but the usual instruction on credi-

bility of witnesses and on how to test testimony. We think the rights of the defendant on how the charge of conspiracy should be dealt with were, by means of the refusal of instruction number three, nowhere guarded; that this refusal made it possible to convict for mere silence and inaction, or for uttering a proposal to bystanders to burn some car, and that, therefore, the refusal constitutes reversible error.

The indictment charges that defendant "did unlawfully remove *and* destroy a street car belonging" to the company named in the indictment. Instruction three requires the state

7. CRIMINAL
LAW: malicious "injury" or "destruction": variance.
to prove unlawful taking possession of *and* removing, injuring or destroying a street car. Instruction twelve holds there may be a conviction if a conspiracy was participated in

"to take possession of, injure or destroy" such car. And instruction fourteen also uses "or" where the indictment uses "and." These instructions authorize a conviction if a street car belonging to the named company was destroyed. There is some casual testimony which indicates that some car of some kind, belonging to someone, had been burned. None that defendant had any part in the burning. Now while, on the question whether defendant was acting as a co-conspirator in an attack upon a street car belonging to the company named in the indictment, it may be relevant that he participated in the burning of some car, even though it was not a street car and did not belong to that company, it furnishes no evidence that any property belonging to that traction company was destroyed. So far as street cars belonging to the traction company are concerned, there is evidence that one of them was run into another; that the fender of the first was thus damaged; and that the impact caused some injury to the other. This was injury, and not destruction. The statute covers injury and destruction by distinct words, and it cannot have been its intention to make one the equivalent of the other. The injury to these cars did not constitute the destruction of either. It seems, then, that it was made possible for the jury to find the defendant guilty of destroying a street car, in the

absence of any evidence that one was destroyed. In this condition of the record, it becomes an important question what objections to these instructions were made below and what is urged against the charge here. We are unable to find that instruction three was challenged below. Assuming this to be a case wherein objection in motion for new trial suffices, the most that can be found is this: (1) An exception that it was error to use "or" where the indictment employs "and," because of the rather strained reason that this confused the jury on which of the several acts specified in the charge conviction could be based; (2) a complaint "that there was no evidence defendant was present at the burning of any of the cars, either at the M. & St. L. depot, or south of town." But this is not addressed to these instructions but to number six, the one on alibi.

It is doubtful, to say the least, whether objection was ever made presenting that a conviction was made possible for destroying a car belonging to the traction company though there was no evidence of such destruction.

8. CRIMINAL
LAW: trial:
reception of
evidence: fail-
ure to object:
when consid-
ered on appeal.

But the fact remains that the charge did authorize such conviction. When we find an error which is perhaps not adequately raised, and there is to be a retrial on which such error might be repeated and properly raised and urged, we may well point out such error. And while we feel that in the state of the record we should not reverse upon this point, we are constrained to say that if, on retrial, the proof remains the same, the instructions given should eliminate the element of destruction of the street car.

V. Instruction eleven charges that the jury has the right to consider the evidence which was introduced as to the good moral character of defendant, and as to his good reputation as a peaceable and quiet citizen; to consider this as bearing on the general issue of guilt or innocence; that it is to be considered on the theory that men of good character in these respects are less liable to commit crime than men of bad character.

9. CRIMINAL
LAW: good
character: ef-
fect on ques-
tion of
guilt.

It is said, however, that this does not rebut the commission of the crime except by inference, and may be considered in such light and for such purpose. The defendant asked that there be added thereto that, if the jury finds it to be a fact that defendant is a man of good moral character, "this is sufficient to overcome the question of guilt where the evidence is not convincing and of such a nature as to exclude a reasonable doubt of his innocence." It is urged it was error to refuse this modification, and a number of our cases are cited in support of this contention. In *Donovan's* case, 61 Iowa 278, 280, the charge was, that "previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and it may be sufficient to turn the scale in his favor, but its value as defensive evidence in any given case is to be determined by the jury." Passing whether this differs substantially from the instruction which the court did give, the objection in the *Donovan* case was that this instruction did not place sufficient effect upon proof of good character, and the case decides that this objection is not well taken, and that the instruction gives all the effect to proof of good character which the authorities warrant. In *State v. Clemons*, 51 Iowa at 278, an instruction given in the *Webster* case, 5 Cush. (Mass.) 295, that, on a trial for murder, testimony of the defendant's good character is competent evidence of defense, though entitled to less weight than in trials for offenses of a lower grade, is disapproved. It is said that the true rule is stated in *Northrup's* case, 48 Iowa 583, and *Horning's* case, 49 Iowa 158.

In *Northrup's* case, the jury was told, in substance, that evidence of good character could be of no avail or benefit to defendants unless the question of their guilt was doubtful upon a consideration of the evidence other than that in relation to their good character. The case holds the true rule to be "that the good character of the accused is for the consideration of the jury in all cases, and it is for them to determine

its weight without any (such) instructions from the court." It is said there may be cases where without evidence of good character the jury would and should convict, and with it they would and should acquit, that a long and honorable life must be worth something to a man when accused of crime in cases other than those where the evidence, independent of his good character, is doubtful or obscure. It is pointed out that under these instructions it was the duty of the jury, first, to determine whether the evidence was doubtful or obscure, without considering the evidence on character, and "if this question was determined in the affirmative, then a verdict of guilty follows." It is held that this places the man who affirmatively establishes a good character on the same plane with one "who has not or cannot do so." It is said:

"No presumption exists against one who does not attempt to establish a good character except such as can be legitimately drawn from the evidence. Therefore, the same quantity and quality of evidence should make a clear or strong case against both. The evidence which creates a doubt, unless good character may be considered in determining whether such a doubt exists or not, must necessarily be the same as to all men and cases, if the rule of the instructions in this case be correct. We cannot subscribe to any such doctrine. Good character, like all other facts in the case, could be considered by the jury, and if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit. Of course, we must not be understood as saying that good character is a defense, for it is not as a matter of law. But it is a fact for the consideration of the jury, as are all the other facts in the case, and they must determine its weight in all cases."

In *Horning's* case, the evidence of guilt was very weak, and the charge that, while evidence of a good character will go far to rebut any presumption of guilt arising from circum-

stantial evidence, as against positive testimony from reliable and creditable witnesses, good character avails nothing and should be disregarded, even if fully proved, is condemned.

In *State v. Jones*, 52 Iowa, at 151, the evidence was circumstantial, and the court charged that "good character affects nothing as against established facts." We held that if this means good character is of no avail where guilt is established, it is right, because good character is no defense against guilt. But it is found that the charge was probably understood in the sense that if, in a case made out by circumstances, the several facts from which guilt may be inferred are established, good character can affect nothing and should have no weight. It is said that this is unsound; that good character is always entitled to consideration, and always should have some effect on the verdict; that where the evidence is circumstantial and the several facts from which it is sought to draw the inference of guilt are clearly established, a jury may from proof of good character alone refuse to infer that the defendant is guilty.

In *State v. Lindley*, 51 Iowa 343, an instruction directing the jury that previous good character would not constitute a defense as against facts positively or strongly proven was held to be erroneous. On page 344, the court said: "There may be cases where a state of facts may be said to be strongly proven, and yet the jury may be justified in the light of an unblemished character in finding a verdict of not guilty."

In *Fitzgerald's* case [*State v. Fitzgerald*], 49 Iowa 260, it is held merely that on whether the presumption was rebutted that an attempt at abortion by a wife was under coercion by the husband, it was error to admit evidence that the defendant consented to her husband's having sexual intercourse with the prosecuting witness months before the alleged crime was committed, especially so in view of the fact that the defendant showed that she was a woman of good character and reputation.

We find in none of these anything that is in substantial

conflict with the rule laid down by the trial court, and that there was no error in refusing the modification offered.

VI. Conceding that the authorities establish that courts usually define words like "preponderance" and "reasonable doubt," and "temporary insanity," this does not persuade

10. CRIMINAL
LAW: defin-
ing terms: ne-
cessity for:
"remove."

us that any error was committed by failure to give a definition of the word "remove." One charge in the indictment is in the language of the statute, to wit: That the defendant unlawfully, etc., did "remove" a certain street car, described. Webster defines the word "remove" to mean "to move away from the position occupied." Bouvier says it means "moving away from the position occupied; to displace; to change in any manner." The jury had before it evidence that the defendant participated with other rioters in violently pushing a street car for some forty feet along the track upon which it stood and finally into another car in front of it, and that all this was done, as an act of violence, without the consent of the owner of the cars. The book definitions of "remove" are natural ones, and give it the meaning that ordinary minds would naturally attribute to it. How a definition by the court would have helped in the simple task of determining whether under such evidence the defendant had been engaged in removing the car, we are unable to see. Offered instruction number one asks a charge that the term means, "To cause the same to leave or cease to be; to take the thing away; hence, to vanish and destroy; and if the defendant did not take the car away or aid or abet in destroying said car at the place where the same was destroyed, he is not guilty, and should be acquitted."

Manifestly, the court was right in refusing to give this instruction. Its basic thought is that unless the car was lifted bodily off the track and spirited away, it was not, as a matter of law, removed, and that, therefore, a summary direction to acquit must follow. Even if we assume that the court should have more fully defined these terms, its failure to do so is

not reversible error, in the absence of a proper instruction asking such definition; and the one offered is manifestly erroneous.

We see no force in the repeated and varied statement of the claim that the instructions of the court did not sufficiently define the meaning of the words "aider" and "abettor," and that the jury was left improperly to draw its own conclusion as to what an aider and abettor might be. Nothing in the citation from 12 Cyc. 616, or *People v. Bond*, 109 Pac. 150 (Calif.), differs from this position. Neither of these go beyond giving a definition of these terms. They do not hold that they must be defined, or defined in any particular way, or more fully than is done here.

VII. The giving of instructions number eleven and one-half and number four is assigned as error. We are favored with no argument on the point. We have examined the instructions and find that number four merely sets out the provisions of the statute under which the indictment was found, and sets them out correctly; and that number eleven and one-half is a correct statement of the care with which statements as to declarations alleged to have been made by witnesses out of court should be received, and how they should be weighed.

For the errors pointed out in Divisions II and IV of this opinion, the cause must be reversed.—*Reversed and Remanded.*

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

ANNA HITCHCOCK, Admrx. of Estate of Wesley Hitchcock,
Deceased, Appellee, v. AROTIC CREAMERY COMPANY, Ap-
pellant.

**MASTER AND SERVANT: Non-Employing Servant—Implied Au-
1,4 thority in Emergency.** An emergency, a pressing necessity, an
unforeseen condition, rendering impossible, without farther as-
sistance, the full performance of the master's specially assigned

work, may, of itself, arm the servant, to whom such work was assigned by the master, with implied authority to employ or accept assistance immediately and essentially necessary to fulfill the task assigned, and thereby clothe the one employed or assisting with the rights of a servant of the master, even though the one employing or accepting the service otherwise has no authority to employ anyone or accept any service on behalf of the master, and even though the one employed or assisting does so under such circumstances that he could recover no compensation therefor from the master.

PRINCIPLE APPLIED: Deceased was employed by defendant in its creamery to wash cans and do light work. On two occasions he had been found doing other work and was directed to quit and go to his own work. The defendant directed its engineer to install, as quickly as he could, an exhaust pipe from the engine in the basement through the floor of a large room above, where deceased worked. The engineer was in charge of the mechanical part of the plant. He was not told how to install the pipe because he knew how. The engineer spoke of getting help and the manager told him if he needed help to get one Wilcox, but did not tell him to get anyone else. The engineer testified he had no authority to employ anyone else without consulting the manager. Wilcox was secured. The engineer used his own judgment in installing the pipe. No one was superior in authority over the engineer in his department in the absence of the manager, and the manager when the pipe was installed was sick and not present. Heavily charged electrical wires, known to the engineer and his assistant but unknown to deceased, ran just beneath the floor. The engineer cut a hole in the floor twelve inches from these wires in order to run the pipe into the basement. Deceased was doing his usual work at this time. The engineer asked him to help move a vat in order to put the pipe through the floor. Three men, not including deceased, tried without success to raise the pipe and put it through the hole. The assistant engineer, without direction to anyone in particular, said: "Give us a lift, boys." The buttermaker and deceased both stood near. The engineer said he did not hear the remark of his assistant engineer. All five men, including deceased, then took hold of the pipe. The engineer testified he did not call deceased or give him any orders, but said: "We needed them and was glad to get their help. I saw them all working with the pipe." It required the combined efforts of all the men to get the pipe through the hole. In doing so the pipe hit the wires, cut through the insulation, the pipe was charged, and deceased was killed. *Held*, the deceased was the servant of the defendant, the engineer having implied authority to accept the services of deceased.

MASTER AND SERVANT: Negligence—"Fellow-Servant" and
2 "Safe-Place-to-Work" Rules—Application of. The "fellow-servant" and "safe-place-to-work" rules are bottomed on diametrically opposite premises: the former, that the master should not be held for the negligence of a fellow-servant because he could not reasonably anticipate or guard against it; the latter, that the master should be held for negligent conditions known to him and which he could reasonably guard against.

PRINCIPLE APPLIED: (See No. 1.) *Held*, the latter rule must be applied.

MASTER AND SERVANT: Safe Place to Work—Hidden Dangers—
3 No Warning. The "safe-place-to-work" rule is violated by a failure of the master to warn the servant of known lurking and hidden dangers.

PRINCIPLE APPLIED: (See No. 1.)

MASTER AND SERVANT: Vice Principal or Fellow-Servant?—Non-
5 Delegable Duties. Whoever is in charge of the performance of a non-delegable duty of the master is a vice principal.

PRINCIPLE APPLIED: (See No. 1.) *Held*, the engineer was a vice principal.

WITNESSES: Credibility of Statements—Rejection of Positive As-
6 sertions. The statement of a witness "I did not hear" is not necessarily conclusive on a jury though undisputed by oral testimony. The surrounding facts may show he did hear.

PRINCIPLE APPLIED: (See No. 1.) *Held*, the jury might well find that the engineer did hear the call of his assistant for help, though testifying that he did not hear it.

Appeal from Woodbury District Court.—HON. DAVID MOULD,
Judge.

FRIDAY, JANUARY 25, 1915.

REHEARING DENIED SATURDAY, MAY 15, 1915.

ACTION to recover damages for personal injury resulting in the death of plaintiff's intestate. Defense, that deceased was a mere volunteer to whom the defendant owed no duty at the

time of the injury. Judgment for the plaintiff. Defendant appeals.—*Affirmed*.

J. W. Hallam and Geo. W. Finch, for appellee.

Sears & Snyder, for appellant.

GAYNOR, J.—This is an action brought by the administratrix of one Wesley Hitchcock to recover damages for injuries resulting in his death.

It appears that Wesley Hitchcock was employed by the defendant in its creamery at Sioux City for the purpose of washing cans, and other light work in connection with cleaning of cans and other utensils about the creamery. At the time of the happening of the injury and death complained of, other employees, under the direction of one Richard Bates, the engineer who had been placed in charge of the work by the defendant company, were lowering an iron pipe through a hole in the floor of the creamery for the purpose of placing it in an upright position from the basement to the ceiling of the room in which they were working; that at said time, immediately beneath the floor of the room from which they were lowering the pipe, there were a number of electric wires, heavily charged with electricity; that while they were so doing, Wesley Hitchcock was called to their assistance, he being in the same room and near by, washing cans and then in the discharge of the duties incident to his employment; that upon such request, Wesley Hitchcock came to their assistance, and took hold of the pipe for the purpose of helping to lower it to the basement through the hole in the floor; that while they were in the act of lowering the pipe through the hole, it came in contact with the electric wires stretched beneath the floor, and the pipe thereby became heavily charged with electricity, and being communicated to Wesley Hitchcock, caused his death.

The negligence charged is in calling the said Wesley Hitchcock from his ordinary work, the work for which he

was employed, to undertake a more dangerous and hazardous task, without warning him or giving him, in any way, notice of the danger attending his act, and in failing to inform him of the presence or existence of the electric wires, of which he had no knowledge, and in failing to furnish him with a safe place in which to do the work, and in permitting him to work in the vicinity of dangerous and deadly wires, heavily charged with electricity, the location of which was fully known to the defendant, its managers, and other employees in charge of the work, or which they should have known in the exercise of reasonable care, and in failing to turn off the electric current from the wires in question while the work was being done, and in failing to turn off the electric current after they discovered that the pipe was being charged with electricity, and deceased was unable to extricate himself.

The defendant's answer sets up the defense of contributory negligence, the negligence of the fellow servant, assumed risk, and further alleges that the wires claimed to have been the cause of the injury were entirely foreign to the work done, and further alleges that Hitchcock was, at the time, a mere volunteer, in that he left the work he was hired to do without the knowledge or consent of his employer.

1. 4. MASTER AND
SERVANT: non-
employing
servant: im-
plied authority
in emergency.

Upon the issues thus presented, the cause was tried to a jury and a verdict returned for the plaintiff. Upon this verdict, a judgment was entered for the plaintiff, and from this defendant appeals and assigns as error:

1st. The undisputed evidence shows that in going to assist and in assisting, he was a mere volunteer; that it was outside of the scope of his employment; that he was not ordered or directed by the defendant, or anyone in authority for the defendant, to engage in the work in which he was engaged at the time of his injury; and that he went to it of his own volition, and without orders, and engaged in work foreign to his regular employment, as a volunteer.

2d. The evidence wholly fails to show that anyone in

authority, as a vice-principal, with authority to bind defendant, was in charge of the work, or gave any orders in connection with it, and shows without contradiction that the only person who was in charge of defendant's work and plant was not there; and there was no vice-principal in charge of the work, and that no one gave any orders, in any event, to the deceased, to engage in the work in which he was employed at the time he received his injury.

The question presented by these assignments of error we will dispose of first, and they present this question: Did the deceased, at the time of the injury, sustain such relationship to the defendant that, in the relationship, there was involved responsibility, on the part of the defendant, for injuries received by the deceased while so engaged?

We recognize the principle which has been well settled in the law, not only of this state, but in other jurisdictions, that the master has the primary right to determine who shall serve him in any particular capacity. The relation of master to a servant involves responsibility and risk, and this responsibility and risk cannot be imposed upon him by another, except with his authority or consent. This authority may be expressed or implied. A mere volunteer, as such, has no claim upon the master, based upon any relationship which creates any right in him to impose this responsibility and risk. He is a mere trespasser, an interloper, one to whom the master owes no duty except that active one which exists in all relationships in life, not to wantonly or wilfully injure him. The master cannot always act personally in relation to, and in the discharge of, his own business. He acts largely through others to whom he delegates authority and power to manage, control, direct and supervise both his business and his servants.

We find evidence in the record of the following facts: One Gear was manager of defendant's plant. Bates was its engineer. Hamm was his assistant. The duties assigned to Bates were to take care of the boilers, pumps, pipe lines, the

heater and the ice machine and everything of a mechanical nature to be taken care of and kept up. Bates talked with Gear two or three days before the pipe in question was ordered. Gear told him to get it, but there was no talk as to when it should be delivered. Bates spoke to Gear about getting help at the time they talked about putting the pipe in. Gear told him if he needed help, to get Charlie Wilcox. Bates was in charge of the job connected with the putting of the pipe through the floor. Gear was at home sick.

Bates testified: "I had charge of the machinery. Hamm was under my control. He was my assistant, and the only one I had anything to do with. I knew how to do the work. It was in my department. Three of us tried to put the pipe through, but could not. We needed help. The buttermaker and this other boy came. It was my judgment and direction to run it through the floor as we did. I saw them all working at the pipe. I felt a shock and let go. I tried to pry the lad (meaning Hitchcock) off, and told someone to pull the switch. I knew at the time there were electric wires under the floor, eight inches below and twelve inches north of the hole. I saw them when I made the hole. I did not turn off the switch. There was nothing to prevent my doing so. So far as I know, Hitchcock did not know of the wires. I cut the hole the way I saw fit. It was left to me; Mr. Gear gave me no instructions. I had no authority over anyone except Hamm."

Hugo Larch testified: "I worked for the Arctic Company when Wesley was hurt. His job was washing cans. At the time of the accident, they were putting in an exhaust pipe for the engine. Mr. Bates, the engineer, had charge of that work, and it was for his engine, the engine downstairs. I saw the hole that was cut through the floor. Should judge it was about a foot square."

Hamm testified: "I got my orders what to do from Mr. Bates, the engineer. Whatever he had to do, I helped him at it, and under his direction. I was assisting him to lower

the pipe when Hitchcock was hurt. Mr. Bates was directing the work. When we first tried to get it through the hole, the hole was not large enough, and we laid the pipe on the floor. It was Mr. Bates who cut the hole larger. I was his assistant, and was acting under his direction in doing the work. The pole struck the electric wire below. It cut through the insulation and came in contact with the copper wire. Both Mr. Bates and myself knew that the wires were there. It was possible to have turned the switch before putting the pole down, and I don't know any reason why it wasn't done. I never saw Hitchcock in the basement where these wires were before the accident. The putting down of the pole was in connection with the engineering department which was in charge of Mr. Bates. The putting down of this pipe was no part of Hitchcock's work, nor of Wilcox's nor of Kimberg's, but we needed all the help we had to get the pipe through the floor."

Bates further testified: "Mr. Gear told me to do this work. The pipe was ordered under his direction. Gear was there when the pipe was delivered. This pipe was necessary for carrying out the plans of my department. It was Hamm's duty to help me if anything was done, and to do anything I directed him in my department. Gear knew we were going to lower the pipe that day. He went home sick. He wanted it up as quick as we could get it done. No one gave me any direction as to how the work should be done. It was in my line, and I knew how to do it. I was head of that department. No one was over me when Mr. Gear was gone. Three of us could not raise the pole, it was too heavy. Then the buttermaker and Hitchcock came. They were working together at the time, and we needed their help. It took all of us to put it through the hole. My judgment was, that it was best to run it through the hole into the basement, and it was at my direction that it was done. The others followed my direction. No one had anything to say about how the work should be done but myself, and Mr. Hamm, my assistant.

Everything done in the engine department was done under my authority and direction, and I got my authority from Mr. Gear, the manager of the plant. The work we were doing was in my department, for the purpose of making it more effective and efficient in the running of the plant. I directed the work, and as to their help, was glad to get it. It was all done under my direction and nobody else. Gear left the work to me. That was my work for that day. They came at the time I was directing the work. No one had anything to do with lowering the pole but me. Whatever directions were necessary to do the work, I gave them."

Harvey Hamm testified: "I was assistant to Bates. I was helping lower the pipe. Bates cut the hole. Wilcox, Bates, Kimberg, Hitchcock were lowering the pipe at the time of the injury. Bates was directing the work. I do not know as anyone called Hitchcock to assist. The call was general. I said, 'Give us a lift, Boys.' They were all around there. They all helped. Bates was right there somewhere. I was assisting Bates, and acting under his direction as the others were. I saw where the pipe struck the wires and cut through the insulation. No one said anything about the wires during the work. I do not think that Bates called Hitchcock. If he came in response to anyone's call, it was in response to mine, 'Boys, lend me a hand.' Putting in the pipe was not Hitchcock's work. I usually obeyed Mr. Bates. The work was in charge of Bates and me. The pipe was a necessary part of the engineering department. It took all the help we had to get the pipe through."

Bates further testified that Gear did not tell him to get anyone to assist except Wilcox, and said that he had no authority to employ anyone else except upon consulting Gear. He was asked this question: "Was Wesley Hitchcock washing cans just before he took hold of the pipe?"

A. "No sir, emptying cream into the vat, and getting the lids off, and taking the samples out and testing for butter fat."

Q. "Did the putting of the pipe down interfere with the cream man's work?"

A. "Yes sir, it did. I asked him to help me move the vat to let the pipe down."

Q. "And then you and Hamm and Wilcox took hold of the pipe?"

A. "Yes sir."

Q. "And these other two boys came up there of their own accord and tried to help?"

A. "Yes sir."

Q. "They came up of their own accord and tried to help?"

A. "So far as I am concerned, I did not ask them. I did not call Hitchcock to help me or give him any orders of any kind or nature. He was there of his own accord, and took hold of the pipe without anybody's telling him. That is, so far as my knowledge goes. Hamm had nothing to say about what work should be done. He was simply employed like the rest of them. He was just supposed to do the work without authority to direct anybody. Everything was done under my authority and direction, and I got this from Gear, the manager of the plant. I gave no directions to any of the men as to how they should work in the putting down of the pipe, or what they should do. We all took hold together. I was the only one that had any authority to direct."

He was asked this question: "Did anyone give any directions there except you as to how the pipe should be lowered?"

A. "Not that I heard. What directions were necessary, I gave."

Bates further testified that he did not hear Hamm say, "Come, Boys, and give us a lift," or words to that effect. Heard no such remark made.

It appears that the building was one story high and a basement; that Hitchcock was employed on the street floor. The room in which the work was being done was about one hundred feet long east and west, and forty or fifty feet wide.

The hole where the pipe was put down was about twenty feet from the north side, and twenty-five feet from the west end.

Gear testified that he was manager of the Arctic Creamery Company at the time Hitchcock hired out to the company; that Hitchcock was hired to wash cans when cream was dumped into the vat, and to put them in their places; to take ice cream cans downstairs, put them on the shelf, and take them to the ice cream maker, "that was all and nothing else. I twice found him doing other things, and told him to quit and go back to his work. He had worked for the defendant about four or five weeks when he was injured."

Bates testified that he heard no call for help.

This is practically all the evidence bearing on the question here under consideration.

We are required to say, as a matter of law on this record, that Hitchcock at the time he was injured, was a mere volunteer, an interloper, and one to whom the defendant owed no duty, and for whose safety it was under no legal obligation to provide; that under the circumstances disclosed by this record, the relationship of master and servant did not exist between Hitchcock and the defendant at the time of his injury.

There is no question in this record but that the plant belonged to the defendant; that the work being done was for the use and benefit of the defendant; that it was in charge of Bates; that Bates was placed in charge of this work by the defendant; that he was directed to put this pipe down by the defendant; that the work was being done in the department to which Bates was assigned, and for the purpose of making that department more efficient and effective, and to make the running of the plant more efficient and effective; that everything done in that department was done under the authority and direction of Bates, and that he got his authority from the defendant; that the manner of doing the work was left entirely to Bates; that Hitchcock did assist him in this work, and this, with the knowledge and acquiescence of Bates; that whatever

directions were given as to the manner of doing the work in placing the pipe in position, were given by Bates. The accomplishment of the master's purpose was, by the master, placed under the charge of Bates. It was understood that he might need help. He did need help. His assistant called for help. Help came in the person of Hitchcock. Came with the knowledge of Bates. Hitchcock was assisting in work that the defendant desired to have done with the knowledge and consent and acquiescence of the party to whom the defendant had delegated the duty of doing the thing. It was out of the line of the duty imposed on Hitchcock by his original employment. He was called to a more hazardous work, without any notice or knowledge of the existence of the dangers that attended the work. He did not, therefore, assume any of the added hazard of this employment. He was not called to this work for any specified time, nor did he receive any additional compensation for the services rendered.

As said in *Maxson v. J. I. Case Co.*, 116 N. W. (Nebr.) 281, a case very similar in its facts to this: "It is claimed the relation of master and servant cannot be created except with the consent of the master, or by his express authority, or in special instances where a servant of the master, without express authority, is compelled from necessity or in some exigency to secure assistance. . . . It may be conceded that the master owes no duty as master to an officious intermeddler who volunteers his services without an invitation expressed or implied from the master. . . . Plaintiff may have been, and likely was, a volunteer in all he did before Thorpe arrived to take charge of the machine, although it was not from a spirit of meddling that he did what was done, but only to secure employment from the man seemingly in authority. Subsequent to Thorpe's statement that he wanted the plaintiff to remain and help, we think he came within the reasoning of Mr. Justice WEAVER in *Aga v. Harbach*, 127 Iowa 144:

“ ‘While the master owes no duty to the intermeddler who officiously interferes and undertakes to perform services without request or employment, and while some courts are inclined to put in the same category those who perform services at the request or order of a servant having no general authority to employ or discharge assistants, the general consensus of opinion seems to be that one who, in good faith, enters upon the master’s work, at the request of a servant in apparent charge of such work, is not a trespasser, but assumes for the time being the relation of a servant. As such servant, he occupies the same relation and becomes subject to the same rules, including the operation of the fellow-servant rule, as those who are directly employed by the master, even though he may not be entitled to recover wages,’ citing *Johnson v. Ashland Water Co.*, 71 Wis. 553; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535; *Georgia P. & R. Co. v. Propst*, 83 Ala. 518. . . .

“In the instant case, the master was a corporation resident in a distant state. The machinery was complex. The agent who had sole charge and control thereof came late in the forenoon of the day, and was hurrying to place it in condition for exhibition. Under those circumstances, it seems reasonable to believe a man seeking employment would have a right to rely on the expert’s authority to employ assistance. It also seems reasonable to hold that the defendant corporation would be charged with notice of the fact that for the advancement of its own interests its expert in sole charge of the machinery at times ought to and might employ assistance.”

In *Rummell v. Dilworth*, 111 Pa. 343 (2 Atl. 355), and *Anderson v. Guineau*, 9 Wash. 304 (37 Pac. 449), it was held that where a servant, with the knowledge or acquiescence of the master, employs a helper and pays him for his services, the one so employed is not a trespasser or volunteer, and while engaged in the master’s work, the master is bound to exercise reasonable care for his safety.

In *Aga v. Harbach*, 127 Iowa 144, it appears that the

defendant was a manufacturer of furniture; that the plaintiff, who was an engineer, was in actual charge of the engine and engine room, and while so engaged he attempted to adjust an incandescent electric lamp by which the room was lighted, and received an electric shock resulting in injury. The claim was that the plaintiff was not in the defendant's service, and the defendant owed him no duty to provide a safe place for work. The defense was, that the plaintiff was a mere volunteer, and that he was not in the service of the defendant at the time of the accident. It appears that Boehler was the engineer regularly employed to have charge of the engines; that Boehler was sick and invited or requested the plaintiff to take his place for a few days until he should be able to resume the work, and the plaintiff was so engaged at the time of the injury. Judge WEAVER, in passing upon the case, said: "It has been held that the servant has implied authority to engage such temporary service and that the substitute or assistant, if not in the law the employee of the master, is at least entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance," citing authority.

In *Johnson v. Ashland Water Co.* (Wisconsin), 37 N. W. 823, it appears that Johnson and Furville made an oral contract with the defendant to dig a ditch in Water Street for a stipulated price per foot; that such ditch was a part of the works necessary for the construction of the water works the defendant was constructing under its charter; that plaintiff was employed by these parties and engaged in digging the ditch; that at the same time the defendant was engaged in the work of calking and laying iron pipes in the ditch which plaintiff was engaged in digging; that Pooley was defendant's superintendent, and had charge of the work of calking and laying iron pipes, and employed men to do such work; that Gansey and several other men were engaged in calking and laying pipes under the direction of Pooley; that when Pooley was not present, superintending

and directing the work, Gansey was authorized by Pooley to direct the same and the men assisting; that while plaintiff was engaged in digging the ditch and Gansey had charge of the work of calking the iron pipes, Gansey called the plaintiff and directed him to raise one of the pipes upon which Gansey was working; that the plaintiff responded, and while so engaged, was injured. It was claimed by the defendant that the facts do not entitle the plaintiff to recover; that he was a volunteer in the work at the time he received his injury. The court said: "Under the allegations of the complaint, the plaintiff was engaged in the defendant's work at the request of the man in charge of the work, and although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servant or foreman, he was not a trespasser, and he was, for the time being, the servant of the defendant and entitled to the same protection as any other servant of the defendant."

In *Georgia Pac. Ry. Co. v. Propst, supra*, the plaintiff was injured while in the employ of the defendant. The facts disclosed that the plaintiff had, at one time, served the defendant in the capacity of brakeman, but at the time of the accident and injury, he was not in that employment. He was then serving as watchman at one of the stations on defendant's road. His duties as watchman were local, confined to that place and station. It appears that one of defendant's trains was passing down the road with loaded freight; that the conductor in charge of the train, feeling that he had not a sufficient available force of brakemen to manage his train, either requested or commanded the plaintiff to go with him and supply the place of a sick brakeman. The plaintiff went in that capacity and, after traveling about thirty miles, was injured. The conductor testified that he had no authority from the superintendent or from the defendant to engage or utilize the services of the plaintiff in the capacity of brakeman. The

court said it was not necessary that there should be express authority for that purpose; that the circumstances themselves gave the authority. "In such an emergency, there must be discretion and authority somewhere to supply the place of disabled or missing servants; and no one could exercise this power so well or so prudently as the conductor in charge of the train. We will, therefore, treat the plaintiff as the lawfully employed servant of the company. Railroad companies are responsible for the conduct of their agents and officials done in the natural or necessary discharge of duties incident to the service they are employed in," citing *Railroad Co. v. Huffman*, 76 Ala. 492; *Railway Co. v. Heddleston*, 82 Ala. 218.

These cases rest upon the proposition that where one is charged by the master with the doing of a certain thing,—the management and control of a certain business for and in behalf of the defendant,—and an emergency arises where extra force is necessary to perform the work, or where temporary assistance is needed to carry on the duty assigned by the master, and the nature of the work suggests the necessity of assistance in its full accomplishment, there is an implied authority vested with the party charged with the work, to secure for the master this temporary assistance. This is the rule upon which the *Propst* case rests. That is to say, that where a brakeman is sick or absent or unable for any reason to perform the duties assigned to him, the conductor who has the charge and management of the train for the defendant, and of the work which the train is to do, has implied authority to procure the assistance of another to discharge these duties, and to accomplish the purpose of the master in the running of the train. As supporting this doctrine, see *Sloan v. Central Iowa Ry. Co.*, 62 Iowa 728.

It has been further held that where, because of sudden, unexpected emergencies, an extra force of brakemen is required for the accomplishment of the purpose entrusted to the conductor, there is an implied authority in the conductor to employ help. There are also cases holding that where one

assists the servants of another, at their request, for the purpose of expediting the master's business or his own business, the relationship of master and servant arises. See *Easton v. S. & E. T. R. Co.*, 65 Texas 577; *McIntyre St. R. Co. v. Bolton*, 43 Ohio 224; *Holmes v. N. E. Ry. Co.*, L. R. 4 Exch. 254.

These cases are made to rest primarily upon the proposition that the complainant was employed to assist by the one superintending and having charge and control of the work. These cases establish this proposition: One who, without employment, voluntarily undertakes to perform services for another, with his assent, stands in the relation of a servant for the time being, and the relationship between the volunteer and the servant is then that of master and servant, and the acquiescence of the party in charge of the work for the master may be inferred from the facts of assistance, with the knowledge and approval of the party having charge of the work.

In the case of *Newport News & M. V. Ry. Co. v. Carroll*, 31 S. W. (Ky.) 132, the action was brought to recover damages for injury sustained while attempting to couple cars on defendant's road. It appears that, for some reason, it was desirable to take out of the train two cars and place them on the sidetrack; that one Smith, who happened to be present, attempted to couple the cars to one already upon the sidetrack. The testimony shows that the conductor told him to couple the cars, and that he acted in obedience to this request. In that case, the company insisted that to entitle the plaintiff to recover it was necessary that he should show by affirmative evidence that the conductor had authority from the company to employ Smith to do the work. The court said, in substance, that the conductor, by virtue of his authority over the train, its management and control for and in behalf of the company, had that authority by implication, and the court said that it may be, as between the railroad company and the conductor, he had no such authority; but, so far as third persons are concerned, his action, orders, and employments in the man-

agement and conduct respecting the train under his control must be held binding upon the company.

This rests upon the proposition that the master having put the conductor in control of the train, of its management, for and in behalf of the master, he had the implied authority to use all reasonable and proper means to accomplish the purpose of the master, and to this end, had a right to employ, in an emergency, any necessary or proper assistance to that end.

We do not overlook the general rule, which is no doubt law, for it has been repeatedly held by the courts, that if a person as a mere volunteer attempts to assist the servant of another, the master of the servant owes the volunteer no duty, and that the volunteer assumes all the ordinary risks incident to the work in which he engages, and that he cannot recover for injuries caused by a defect in the instruments used, or by the mere negligence of the servant. This was held in *Church v. C. M. & St. P. Ry. Co.*, 50 Minn. 218.

But this holding is not inconsistent with this further proposition that underlies our decisions, that after discovering that the volunteer has placed himself in a position of danger, the servant having failed to exercise reasonable care, after such discovery, to avert the danger, the master may be still held liable. The question turns, however, usually upon the authority of the servant to employ assistance; but as said before, this authority may be implied from the nature of the work assigned for him to do, and the necessity of employing assistance, apparent in the very nature and character of the work assigned, and it has been held that where the assistance is rendered with the permission of one who has authority, whether express or implied, to employ help, the one assisting acquires the rights of an employee. See *Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. 448.

Johnson v. Ashland Water Co., *supra*, sustains this doctrine, and it is there held that where one in charge of the master's work requests another for temporary assistance in performing the defendant's work, though the servant expects

no pay and no obligation arises to pay, he is, for the time being, the servant of the defendant and entitled to the same protection as other servants.

The doctrine seems to rest upon the proposition that, where one is placed in charge of the master's work, and in the discharge of this work an emergency or a condition arises that requires assistance for the full performance and completion of it, and this necessity is apparent to the one in charge of the work, and to the one who offers assistance, and the assistance is rendered with the knowledge and consent of the party in charge, and is accepted by him as immediately and essentially necessary to the accomplishment of the task assigned by the master, the party assisting sustains the relationship of servant to a master, and where such condition or emergency arises in the discharge of the work assigned, there is implied authority on the part of the one who has the sole charge and supervision of the work to employ assistance under such conditions for and in behalf of the master.

In the case at bar, the work was assigned to Bates. It was recognized at the time that assistance might be necessary to accomplish it. The deceased was in the employment of the defendant in another department, but was present at the time the work was being done. Bates made one effort to place the pipe with the assistance of Hamm and Wilcox, but had failed. They were unable to accomplish the master's work without further assistance. Hamm, who was present assisting Bates, called for assistance. The assistance came. Bates accepted the services of the deceased because it was necessary to the accomplishment of the work assigned, and we think, because of the necessity for the service, the acceptance of the service by Bates was within his authority—that he accepted it, not for himself, but for the master, and to accomplish the master's work. Therefore the deceased was, at the time, engaged in the master's service, with the assent of Bates, who had implied authority from the master to accept his service, and it is wholly immaterial whether Bates heard Hamm's Macedonian

cry for help or not. The deceased came at the opportune time, came when he was needed, came to render assistance, his services were accepted and approved by Bates, who was then in charge of the work for the master.

We are not without authority in our own state for these propositions. See *Meier v. Way, Johnson, Lee & Co.*, 136 Iowa 302, second paragraph of opinion; *McGuire v. Mill Company*, 137 Iowa 447. See also *Collingwood v. Fuel Co.*, 125 Iowa 537; *Short v. Light & Power Co.*, 149 Iowa 303.

It is next contended that if the above be true, Bates was then a fellow servant, and under the fellow servant rule, the defendant is not liable for the negligence of Bates.

It must be remembered that the fellow servant rule rests upon the assumption that the party who is engaged in a distinct business assumes all the risks that are necessarily incident to that business, including the possible negligence of a fellow servant. The master is not held liable for the negligence of a fellow servant because such negligence could not by the master be anticipated and guarded against. It is, therefore, one of the risks which the servant assumes when he engages in an employment, together with all the risks that are incident to the immediate business in which he is employed—risks which the master could not anticipate and guard against by the exercise of such care as the law requires of him. The deceased was not employed at the time by the defendant in any hazardous business. He was called by the defendant's engineer to a business more hazardous than the one in which he was engaged, and hazards which were concealed and of which he had no knowledge. The dangers lurked beneath the floor, and by the exercise of no reasonable care on the part of the deceased, could they have been anticipated or guarded against. These dangers were well known to the engineer at the time he attempted to lower the pipe, and at the very time that deceased was assisting him in the work. The engineer, by the very nature of his employment, by the

2. MASTER AND
SERVANT :
negligence :
"fellow-serv-
ant" and
"safe-place-to-
work" rules :
application of.

position he occupied, and by his superior knowledge and skill, was in a position to direct and control, and did direct and control the work as it progressed. The record does not disclose that any specific directions were given by Bates to the deceased, but he does say in his own testimony that whatever directions were given as to how the work should proceed were given by him; that he alone had authority over the work to direct and control it. We do not think then that the fellow servant rule applies to the deceased in this case. The negligence of Bates was the negligence of the defendant. His authority to act, to do the thing, came directly from the defendant. The defendant, to add to the efficiency and better working of its plant, employed Bates to connect this exhaust pipe. It was not the ordinary work connected with the running of the business. It was work independent of the immediate operation of the plant, done for the betterment of the plant, work that no one had a right to do by virtue of his general employment, except under direction from the master. The power was delegated to Bates to do it. His act was then the act of the master. He says himself that he had absolute control not only over that department, but over this specific work after it was ordered to be put in. His negligence was the negligence of the master. Therefore it comes that the injury is chargeable directly to the negligence of the master in failing to provide a safe place to work, and guard the working men against unforeseen and unknown dangers, all of which could, by the slightest care, have been removed. The mere turning off of the switch would have avoided this fatal accident.

In *Madden v. Railroad Co.*, 32 Minn. 303, it was held that the servant does not take upon himself the risk, by reason of the neglect on the part of the master, where those risks arise from conditions known to the master, but unknown to the servant, unless it be shown that, by proper diligence, he could have discovered the danger and by the exercise of reasonable care, he could have avoided it.

The rule is that it is the duty of the master not to expose the servant to any injury which may be reasonably anticipated and guarded against. Of course, there is a difference in

the rule where the danger is created naturally in the progress of the work itself, where the risk does not exist, but arises out of the doing of the work. That is, if the work is of such a character that in its progress it naturally creates a risk of injury, this should be anticipated and guarded against by the employee. The servant assumes these risks because they are incident to his employment. They grow out of the very thing he is doing, and are created thereby. He assumes the risk in such cases because the danger is incident to, and naturally arises out of, the work he undertakes to do, but this does not apply where the work in and of itself involves no risk, but the risk arises from matters and conditions permitted by the master to exist, which are unknown to the servant, and because of which the servant's safety is imperiled.

As said in *Martin v. Light Co.*, 131 Iowa 725, 733: "The servant may properly be held to the risk of the extraordinary danger which is naturally incident to the extraordinary service; but he never takes the risk of the master's negligence under any circumstances, save when he knows of such negligence, or as a reasonably intelligent person ought to have known of it, and chooses to remain in the service.

As bearing upon this question, see *Collingwood v. Fuel Co.*, 125 Iowa 537. In this case it is said: "That it is the duty of the master to provide a safe place to work is a rule of universal application. Accordingly, if the service is attended by conditions dangerous to the uninitiated, and not open and patent to the ordinary observation, the rule puts upon the master the duty to warn of the danger, and failing to do so, whereby injury occurs, he may be held negligent," citing *Eller v. Loomis*, 106 Iowa 276, and other cases.

This case further holds that the master may delegate the performance of this duty to a servant, but the responsibility

remains with the master if the duty is not done and injury results. Of course, in this *Collingwood* case, it was held that the duty—a breach of which constituted negligence—was the duty imposed upon the master by law, and we hold here that the duty rested on the master to warn the deceased of these lurking and bidden dangers which were known to Bates and out of which the injury arose. See also *Meier v. Way, Johnson Lee & Co., supra*; *McGuire v. Mill Company, supra*; *Vohs v. Shorthill & Co., 130 Iowa 538*; *Kerker v. Wheel Co., 140 Iowa 209*.

It is contended, however, that Bates did not call the deceased from his usual work to assist in this work in which he was injured. We hold that under this record, Bates had implied authority to secure additional assistance in placing this exhaust pipe if necessary to accomplish the work. We find that Hamm says that he was under the direction and control of Bates and called for assistance; that the deceased came, with the knowledge of Bates, with his approval. As Bates says, he needed his assistance and was glad to get it. He permitted him to assist. Hitchcock is dead. A mere call from Bates for assistance, if such a call had been made, would have added nothing to the situation. He needed help, he wanted help, his assistant called for help. He was near by at the time the call was made. The deceased came, and in rendering assistance was injured. It would be stretching the matter to a breaking point, and to do so would require such subtle reasoning that we are not disposed to say that Hitchcock was a mere volunteer, or that, under this record, no other conclusion could be justly reached by the jury.

Authorities are cited which it is claimed conclusively show that under this record, the plaintiff was a fellow servant with Bates, and the company was not liable for the negligence of Bates.

It is well recognized in the law that a servant may occupy

1. 4. MASTER AND
SERVANT: non-
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servant: im-
plied authority
in emergency.

5. MASTER AND
SERVANT: vice-
principal or
fellow serv-
ant: non-
delegable
duties.

a dual capacity. In one capacity, he may bind the master by his negligent act; that is where he is attempting to discharge a duty which the master owes to an injured servant. The other is where he is rendering a service for the master which it is not the duty of the master, for the protection of the servant, to do, but which is in the line of the general employment of the servant. An instance of the first would be where it is the duty of the master to furnish a safe place to work, and he delegates that duty to a servant, no matter how menial. The servant is then performing a duty for the master which the master owes to the other servant, and the master is liable for a negligent discharge of this duty resulting in injury. The master is not liable where the injury results from a negligent and improper manner of performing work which it is the duty of the servant to perform, and the performance of which involves no duty, on the part of the master, to the other servant.

We are cited to *Peterson v. C. R. I. & P. Ry.*, 149 Iowa 496. In that case it is apparent that the injury to the plaintiff was not due to the character of the place in which he was put to work, but the fault of Dreager in starting the machinery, thereby negligently creating a danger which did not theretofore exist. The danger was created by the act of the servant. His negligence could not be anticipated or guarded against, and the master owed no duty to the other servants to protect them against this act. It is said in that case that it became dangerous only by reason of the fault of Dreager in starting the machinery without proper warning. The place where the plaintiff in this case was required to work was perfectly safe, except for the negligent act of Dreager, who was, in the doing of the act, a fellow servant.

It is true that when the employer or those representing him have provided a place which is reasonably safe in itself, then the risk incident to the progress of the work as carried on by the employees is assumed by virtue of the

employment. The question of whether one is a fellow servant or a foreman, or superintendent does not depend upon the rank, but upon the nature of the act itself—whether it is one in connection with which the foreman is engaged with other employees in prosecuting a common undertaking. But it is the rule that where a servant is entrusted with the performance of a duty which the law enjoins upon the master, he is, as to such service, a vice-principal, and his negligence is the master's negligence.

The duties which the law enjoins upon the master are to furnish a reasonably safe place to work; reasonably safe tools and appliances with which to do the work; to give servants timely warning of dangers which are known, or ought to be known to the master, but which are neither known nor patent to the servant; to supply a sufficient number of competent workmen for the safe conduct of the particular labor in which the servant is engaged; to exercise such direction and control and supervision over the work as may be required to carry on the same with reasonable safety to all employed therein. Any failure in respect to these duties, whether by the master in person, or by any employee to whom the performance is committed, is negligence for which the master may be held liable. This negligence may consist of matters of omission or commission. This is the holding in *Beresford, Adm., v. American Coal Co.*, 124 Iowa 34.

We are also cited to *Barnicle v. Connor*, 110 Iowa 238; *Scott v. C. G. W. Ry. Co.*, 113 Iowa 381.

Every case has its own peculiar distinguishing facts, and it is sometimes difficult to draw the line of demarcation and say on which side of the line the rule contended for lies, but this we note, that in the cases cited, the act or the omission to act, out of which the injury arose, involved no positive duty enjoined by law upon the master. In the case at bar, the deceased was called to work at a place in which there were lurking dangers, unknown to him, but known to the one in

charge of the work for the master. He was not warned^o of these dangers.

We quote the following from *C. N. W. Ry. Co. v. Bayfield*, 37 Mich. 205, opinion by Justice Cooley: "We also think that where the superior servant, by means of authority which he exercises by delegation of the master, wrongfully exposes the servant, and in consequence he is injured, the master must respond. It is only where the risks particularly pertain to the business, and are incident to it, that the master is excused from responsibility."

This case holds to the doctrine that if the master sends his servant into a dangerous place, and thereby exposes him to risks not connected with the service in which he is employed, and in consequence he is injured, the master is responsible because the risk is not one which the servant has assumed; and that when, instead of being sent by the master in person, the servant is exposed to danger by the act of one who is placed over him, the liability is that of the master.

It is apparent that the deceased in entering the defendant's service assumed only such risks as arose from the negligence of his co-employees, and such as might be incurred within the scope of his employment. He did not assume any dangers incident to the more hazardous employment without knowledge of the hazard, without notice of the dangers and where the dangers were such that he could not, by the use of reasonable care, have ascertained them.

As in point upon the question involved in this case see *Haluptzok v. Great Northern Ry.* (Minn.), 26 L. R. A. 739, 57 N. W. 144. Judge Mitchell, delivering the opinion, said: "It is not necessary that a formal or express employment on behalf of the master should exist, or that compensation should be paid by or expected from him. It is enough to render the master liable if the person causing the injury was in fact rendering services for him by his consent, express or implied. Under this view of the law, the evidence made a case for the jury to determine whether Westinghouse had implied author-

ity from the defendant to employ O'Connell as an assistant, or, to state the question differently, whether O'Connell was rendering these services for the defendant by its consent."

It is true that in this O'Connell case Westinghouse had, for a long time, been employing assistants under similar arrangements to those made with O'Connell, and this was considered an important fact in the case.

It is next contended that the court erred in its instructions to the jury. A careful reading of these instructions shows them to be consistent with the facts and the law, and not subject to the criticism offered. It is insisted that the court submitted to the jury the question as to whether Bates heard the call for assistance, as a fact upon which the jury might pass, whereas Bates swore positively that he did not hear the call: but the evidence, however, is that the call was given by Hamm; that Bates was there at the time; that immediately upon the call, these parties came to the assistance of Bates. The jury might well have found, notwithstanding Bates' statement that he did not hear, that he did, in fact, hear but had forgotten the circumstance.

We do not find any reversible error in the case, and the cause is, therefore, affirmed. The other errors assigned are disposed of by what has been heretofore said.—*Affirmed.*

DEEMER, C. J., LADD and SALINGER, JJ., concur.

MERCHANTS TRANSFER AND STORAGE Co., Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RY. Co., Appellee.

RAILROADS: Negligence—Rules Governing Employees—Admissibility. The "rules" of a railroad company, adopted for the government of its employees, are not admissible in an action to recover damages on account of the negligence of the employees in backing a train upon a party at a crossing.

TRIAL: Instructions—Refusal of Correct Instruction—Duty of Court.
 2 The better practice is for the court to formulate its own in-

structions, even though the ones requested are correct. But if those asked and refused involve questions which ought to be submitted, then the court must give an instruction embodying the thought of the ones asked and refused.

RAILROADS: Negligence—Right of One to Presuppose Care by An-
3 **other.** The right of the traveler, in approaching a railroad crossing, to assume that the railroad employees will exercise ordinary care in operating cars over the crossing is not a one-sided right. The railroad employees also have the right to assume that the traveler will exercise the same degree of care in approaching and going upon the crossing.

RAILROADS: Negligence per se—Absence of Flagman. Negligence
4 *per se* cannot be predicated on the absence of a flagman at a railroad crossing situated at or near the mouth of an alley one-half block long and closed except at the crossing. Whether such omission is negligence depends on the particular circumstances of each case. In instant case, *held*, the question was properly submitted to the jury.

RAILROADS: Negligence—Care Proportionate to Danger—Suffi-
5 **ciency of Instruction.** The thought "that the care required on the part of those operating trains must bear some reasonable proportion to the known peculiar dangerous character of the particular crossing which they are approaching," is sufficiently embodied in an instruction (1) that it was defendant's duty not to be negligent, (2) that correctly defined negligence, and (3) directed the jury in determining the question of negligence to consider all the surrounding circumstances.

EVIDENCE: "No Eyewitness" Rule—Contributory Negligence—
6 **Presumption of Care.** The full statement of the "no eyewitness" rule is: Where a party is dead and there is no eyewitness (and therefore no obtainable direct evidence) as to the manner in which he conducted himself at and immediately preceding the time of an injury, a presumption arises that he was exercising that care and caution that a man of ordinary prudence, judgment and discretion exercises, under like circumstances, and in relation to the same matter, unless the facts and circumstances shown upon the trial negative such presumption.

PRINCIPLE APPLIED: There were eyewitnesses to the conduct of deceased at the time of the collision.

1. An instruction asked read: "You are instructed that in the absence of *direct evidence* as to whether he exercised proper care . . . the law presumes, etc." *Held*, fundamentally erroneous.

2. An instruction given read: "You are instructed that where there are no eyewitnesses as to the manner in which plaintiff's employee, now deceased was conducting himself at the time of the collision and at which time said damages are alleged to have been caused, the law presumed, etc."

Held, erroneous because (1) reasonable minds might differ and speculate as to its proper construction, and (2) it would, from its very terms, bear a construction entirely neutralizing itself, to wit: (a) There is no presumption that deceased was free from negligence in approaching the crossing, and (b) there is no such presumption at the time of the collision, because there were eyewitnesses at that time.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

JANUARY 22, 1915.

REHEARING DENIED SATURDAY, MAY 15, 1915.

ACTION to recover damages for injury to property. Opinion states the facts.—*Reversed*.

Hager & Parrish, for appellant.

F. W. Sargent and R. J. Bannister, for appellee.

GAYNOR, J.—This is an action to recover damages for injury to personal property alleged to have been caused by the negligence of the defendant.

The place where the accident occurred was near the mouth of an alley between two streets. These streets are known as Sixth and Seventh Streets, and run north and south across the defendant's tracks. The collision which caused the injury was near the mouth of this alley. Defendant's tracks are on Vine Street. This street runs east and west immediately south of the alley, and across Sixth and Seventh Streets. This alley appears to have been vacated and closed up, both to the north and to the south of defendant's tracks, except that it was left open one-half block north from the track for the purpose of serving two warehouses, one

to the east and the other to the west of the alley. The one to the west is known in this record as the International Harvester Building, and the one to the east is known as the Davidson Building. The Davidson Building had burned down prior to this accident, but the south walls were still standing. The alley was twenty feet wide.

It appears that at the time of this accident, the defendant had placed cars south and east of the alley on one of these tracks. The west end of the nearest car was nine feet east of the east line of the alley. The southwest corner of the west box car, from the wall of the Davidson Building, was twenty feet and six inches away. From the north side of the west car to the wall of the Davidson Building was eleven feet, ten inches. It was sixteen feet from the south line of these buildings to the center of the track on which the cars were standing. The track is four feet eight and one-half inches wide.

The track on which these cars were standing is practically parallel with the track upon which the train was being operated at the time of the injury. The evidence shows it was 7.2 feet between the tracks.

It appears that on the day of the accident, one Samuels was in charge of plaintiff's wagon and horses, and had just loaded his wagon from the door east of the Harvester Building farthest north on the alley, and was proceeding south through the alley towards defendant's tracks, and in attempting to cross the track, came in collision with a train being backed towards the west, and in this collision, the horses were badly injured, the wagon wrecked, and Samuels killed.

The acts of negligence upon which plaintiff predicated his right to recovery are:

1st. That the defendant, in backing its train towards the west and across this alley, did not keep a proper lookout, and gave no warning of the approach.

2d. That the brakeman in charge of the car at the time of the accident negligently placed himself near the southeast

corner of the car where it was impossible for him to observe the approach of plaintiff.

3d. The defendant negligently failed to have anyone stationed upon the car, or in its vicinity, to observe the approach of teams from the north, through the alley, to give warning of the approach of defendant's trains.

4th. The car that struck the plaintiff's team was being switched at the time, at an unnecessarily high rate of speed.

5th. That the defendant was negligent in the failure of its employees to observe certain rules which it had itself promulgated for the observance of its employees.

6th. That the defendant was negligent in placing the cars on the north side of Vine Street so as to obscure the approach of cars on its tracks.

It appears that the court, on motion of the defendant during the progress of the trial, struck out the fifth ground of negligence alleged, and withdrew it from the consideration of the jury. The court, in submitting the case to the jury, submitted only the 1st, 2d, 3d and 4th grounds of negligence above stated.

The answer of the defendant was a general denial. Cause was tried to a jury and verdict returned for the defendant, and judgment being entered upon this verdict, plaintiff appeals.

It appears that upon the trial of the case the plaintiff offered in evidence defendant's book of rules and regulations, and exclusion of this is the first error assigned. These rules were promulgated by the company, and are as follows:

1. RAILROADS:
negligence:
rules govern-
ing em-
ployees: ad-
missibility.

102. When cars are pushed by an engine (except when shifting and making up trains in yards), a flagman must take a conspicuous position on the front of the leading car.

102a. Trains or cars must not be pushed over streets, highway crossings, or street or electric railway or steam railway crossings at grade, unless a trainman is on the leading

car, or on the track or ground ahead, to see that the crossing is clear; and trains or cars shall be pushed over such crossings only on his signal.

Passenger cars in service or occupied must not be switched unless coupled to the engine and with air brakes in use.

110. Approaching or passing through stations or yards, or over railroad crossings, drawbridges, or track covered by slow orders, or on long descending grades and at other places where safety requires extra precaution, brakeman must be on top of freight trains in position to observe and assist in stopping the train should air brake failure or other emergency require. Enginemen and firemen must keep watch for signals from trainmen while passing over slow track and on freight trains, obtain a "Proceed" signal from the rear when the train has passed over and also after all switches or a station have been passed; this signal to be acknowledged by the whistle signal.

These rules were offered as tending to show negligence on the part of the defendant's employees in the transaction in controversy and as admissions or declarations of the defendant.

This assignment is disposed of by the former holdings of this court. See *Hart v. Cedar R. R. Co.*, 109 Iowa 631, and cases therein cited; *Blumenthal v. Electric Co.*, 129 Iowa at page 324; and *Carter v. Sioux City Service Co.*, 160 Iowa 78. These holdings rest on the proposition that the law regulates the duty of the railroad company to the public. The standard of care required is fixed by the law. The railroad company can promulgate no rules for the conduct of its servants, whether they require more or less than the law requires, and bind the public by such rules. All negligence rests upon a supposed duty that the party charged owes to the public in cases of this kind, and that is a legal duty, or a duty imposed upon it by law. The standard of care is fixed by the law. The liability rests upon the violation of the legal duty it owes to the public. If the law should require

but one lock upon a door, and the one on whom the duty of placing the lock rests should instruct his servant to place two locks, and the servant should only place one lock, the master has violated no duty that the law imposed upon him by failure of his servant to put more than one lock upon the door.

It is next alleged that the court erred in refusing certain instructions asked by the plaintiff. The rule is,—the court is not bound to submit every instruction requested, even

2. TRIAL: In-
structions: re-
fusal of cor-
rect instruc-
tion: duty of
court.

though the instruction asked be unobjection-
able in every essential particular; but if the
instruction asked involves a question which
ought to be submitted to the jury, the court
is bound to give an instruction embodying the thought of the
instruction asked, and we think the better practice is for the
court to formulate the instructions itself, rather than submit
the instructions as prepared by the party who requests.

Plaintiff asked the court to submit five instructions. From
an examination of these five instructions and the instruc-
tions actually given by the court, it is apparent that every
proposition involved in these instructions was fairly and fully
submitted to the jury in the instructions given by the court
on its own motion.

In construing the charge of a court to a jury, the whole
charge must be considered together. Isolated sentences from
one paragraph of an instruction cannot be taken as error
when the instruction, considered as a whole, fairly and fully
presents the law of the case.

It is complained by the plaintiff that the court refused
a requested instruction to tell the jury that the plaintiff's
driver, in approaching and driving upon the crossing,

3. RAILROADS:
negligence:
right of one
to presuppose
care by
another.

had a right, unless notified to the contrary,
to anticipate reasonable care on the part of
defendant's employees, a fact which is to be
considered in determining whether the team-
ster exercises care in approaching and going upon the
crossing.

The court did say to the jury that plaintiff's employee, in the absence of notice or knowledge to the contrary, had a right to assume that the defendant would exercise ordinary care, and the defendant, in the absence of notice or knowledge to the contrary, had a right to assume that the plaintiff's employee would exercise ordinary care. Neither will be presumed to have had notice or knowledge of the negligence, if any, of the other in the absence of proof of such facts as show such notice or knowledge.

In *Cummings v. C. R. I. & P. Ry. Co.*, 114 Iowa 85, it is said: "While negligence on the part of the defendant will not excuse the plaintiff from exercising care on his part, he had a right to assume that the defendant would not be negligent on its part."

In *Case v. C. G. W. Ry. Co.*, 147 Iowa 747, 751, the court in discussing this proposition said: "But one about to cross a railway track has the right to assume the trains will not be run at an unlawful rate of speed; that the usual and customary warnings will be given; and that the railway company will comply with its duty in approaching street crossings."

The converse of this proposition is true: that the railway company has a right, when approaching a public crossing, to assume that the traveler upon the highway will exercise reasonable care for his own safety, and this is the proposition as stated by the court, and the instructions, we think, cover the matter complained of.

It is further complained by the plaintiff that the question as to whether the defendant was negligent in failing to have someone stationed in the vicinity of the approaching train,

to give warning of its approach, was one that should have been submitted to the jury, in view of the conditions that there existed, and argues that the court nowhere in its instructions presented this feature of the case to the jury, although requested by the plaintiff in the first instructions asked. The

4. RAILROADS:
negligence per
se: absence of
flagman.

court, however, said in its instructions to the jury that the plaintiff claims that the defendant was negligent in "failing to have anyone stationed upon the said car, or *in the vicinity thereof to observe the approach of teams from the north*, and in giving no warning of their approach. In considering this charge of negligence, you will take into consideration the business in which the defendant was engaged; the location where the accident is alleged to have occurred, and the surroundings thereabout; the manner in which defendant moved its cars upon the track at that time and place; whether the engine bell was ringing, or other alarm given, to indicate the approach of the train; the speed at which the train was being operated; whether the defendant had a lookout on top of the car, or in such a position on the car that the plaintiff's employee could be warned of the approach of the cars and engine, and in determining this question you should take into consideration all the facts and circumstances disclosed by the evidence as tending to show whether the defendant was or was not negligent in these particulars as charged." The court defined negligence in its instructions (and the instructions must be read all together), "Negligence consists in doing something, or in omitting to do something which a person of ordinary prudence or care would not have done, or would not have omitted to do, under like or similar circumstances."

The court in this same instruction, covering this same point, said in substance: It was the duty of the defendant in the operation of the cars to exercise ordinary care. A failure on its part to exercise such care, in respect to the matters charged by the plaintiff in its petition, would constitute negligence, and you should consider the definitions of ordinary care and negligence as given in these instructions.

The court defined ordinary care as follows: "By ordinary care is meant that degree of care which an ordinary and prudent person would exercise under the circumstances. Ordinary care consists in doing everything which a person of reasonable and ordinary care would do, or in omitting to

do everything which a person of like care and prudence would omit to do under like circumstances."

We think the thought suggested by the requested instruction was fully covered by the instructions of the court, when considered as a whole.

The law does not enjoin upon a railroad company, at all times and all places where a public highway crosses its tracks, to maintain a flagman or to place one there to watch and observe whether persons upon the public highway are about to cross the tracks. As said in *Annaker v. C. R. I. & P. Ry. Co.*, 81 Iowa 267, 271, 3d paragraph of opinion, "It is not negligence *per se* for a railway company to omit to keep a flagman at every street or highway crossing, at any given hour of the day or night. Whether such omission is negligence depends upon the circumstances, such as the frequency with which trains are passing, the amount of travel, the opportunities, or want of opportunities, for travelers observing the approach of trains, and the like. It is clearly a question of fact as to whether the defendant was negligent in not having a flagman at this crossing at the time of this accident, and that question was properly submitted to the jury."

There is no evidence in this case of the amount of travel out of this alley over defendant's tracks. The necessity for a flagman at any particular crossing is not determined by the application of legal principles, but depends upon the necessity growing out of the conditions, and this is a question for the jury. See *Tierney v. C. & N. W. Ry. Co.*, 84 Iowa 641.

The absence or presence of a flagman at a public crossing is a proper question to be considered in determining whether or not the party charged with negligence acted as a reasonably prudent and cautious person would act under like circumstances, and is to be considered by the jury with all the other evidence, facts, and circumstances disclosed, in determining whether ordinary care was or was not exercised.

It is next contended by the plaintiff that in the instruc-

tion asked by it, the court was requested to say to the jury *that the reasonable vigilance required, on the part of those operating trains, must bear some reasonable proportion to the known peculiar dangerous character of the particular crossing which they are approaching.*

5. RAILROADS :
negligence :
care propor-
tionate to
danger : suffi-
ciency of
instruction.

The court in its instructions to the jury said: "It was the duty of the defendant not to be negligent, and that negligence consisted in the doing of something which an ordinarily prudent person would not do, or the omission to do something which an ordinarily prudent person would not omit to do under *like circumstances, and in respect to the same matter.*

"In determining whether or not the defendant was negligent in respect to the matters charged, you will consider the nature and character of the business in which it was engaged; the location where the accident is alleged to have occurred, and the *surroundings thereabouts*; the manner in which the defendant's cars were moving at the time and place in question; the facts and circumstances relating thereto; whether the bell was ringing or other alarm given to indicate the approach of the train; the speed at which the train was being operated; whether the defendant company failed to keep a lookout on the top of the car, in such a position on the car, that struck the plaintiff, that plaintiff's employee could be warned of the approach; what the employees in charge of the train were doing, or what, in the exercise of ordinary care, they should have been doing; what they knew, or, in the exercise of ordinary care, should have known at the time and place, or where, in the exercise of ordinary care they should have been, and these, with all the other facts and circumstances disclosed by the evidence tending to show that the defendant was, or was not, negligent, as charged by the plaintiff in its petition."

It was the duty of the defendant in backing its train down the street and past this alley, under the circumstances shown in this case, to use reasonable care to keep a lookout

on the car; to observe whether teams might be driving out of the alley from the north, and to give due warning of their approach, and a failure to do so would be negligence, and the court properly said to the jury, it was for them to say whether, under all the facts and circumstances and conditions existing there, the defendant company exercised that degree of care which an ordinary careful and prudent person would exercise under like circumstances, whether it omitted to do that which an ordinary prudent person would not omit to do, or whether it did anything that an ordinary prudent person would not do in view of the conditions shown to exist at the time.

We think this fully covers the thought of the requested instruction, to wit, that the vigilance on the part of the train crew must bear a reasonable proportion to the known dangers.

As has been frequently said, words are intended to convey ideas. Scarcely any two persons will phrase the same thought in the same way, but if the thought is conveyed by the language used, if the language used properly conveys the thought desired to be expressed, it is sufficient, though perhaps another might phrase it differently, and perhaps more clearly. We cannot reverse cases on account of the phrasing of the law, if the expression used, when fairly interpreted, conveys to the jury a knowledge of the rule by which they are to be guided. Jurors are supposed to have ordinary intelligence, and ordinary experience in the affairs of life, and a reasonable knowledge of the English language and its use and the meaning of words that are in ordinary use, to which no technical signification has been given, and they are supposed to understand what is meant by "ordinary and reasonable care" when applied to the conduct of reasonable thinking human beings. When the court tells the jury that where one owes a duty not to injure another, he must use that care and caution, in view of all the facts and circumstances attending his act, which a reasonably prudent and cautious person would use under like circumstances, it must be assumed that the jury understood. It is not necessary, nor is it proper,

in addressing a jury through the instrumentality of instructions, that the court go into and define what specific acts are required of a person in any particular case, to constitute ordinary and reasonable care. Nor is it proper for the court to say to the jury what specific acts of omission or commission constitute the care which a reasonably prudent person would exercise under any given set of circumstances. The court in its instructions to the jury, we think, placed before them, not in the words in which it was asked by the counsel for plaintiff, but in its own words, the thought that in judging of the care used by either party to this unfortunate transaction, the care used, to be reasonable, should be in proportion to the danger to be anticipated.

While a party is required, under the law, to exercise reasonable care and caution for the safety of another, the care and caution used, to be reasonable, must be such as a reasonable and prudent and cautious man would exercise under like circumstances, and in relation to the same matter. What would be reasonable care and caution under one set of circumstances might be gross negligence under a different set of circumstances. The question is ultimately for the jury whether, under all the facts and circumstances disclosed, the party charged with negligence did or did not exercise that care and caution which a reasonably prudent and cautious man should exercise under conditions attending and surrounding his act. We think this question has been fairly discussed in *Gray v. Ry. Co.*, 160 Iowa 1.

The last question contended for by counsel for the plaintiff as a ground for reversal is that the court refused to give an instruction asked by the plaintiff, in which the plaintiff claims to have correctly expressed the law as to the presumption that exists, in the absence of an eyewitness, on the question of the contributory negligence of the plaintiff. The instruction asked by the plaintiff is as follows: "Upon the question of the contributory negligence of

6. EVIDENCE:
"no eyewitness rule";
contributory
negligence;
presumption of
care.

the plaintiff's teamster, Samuels, you are instructed that in the absence of direct evidence as to whether he exercised proper care *in approaching and going upon said crossing*, the law presumes that he exercised such care and caution as men of ordinary prudence, judgment and discretion exercised under like circumstances, and in relation to such matters, unless the facts and circumstances shown upon the trial negative such presumptions; and you will indulge in such presumption in his favor unless the facts and circumstances shown on the trial negative such presumptions."

The instruction given by the court on its own motion reads: "In this connection and as bearing upon the question of the contributory negligence, if any, of the plaintiff's employees, you are instructed that where there are no eye-witnesses as to the manner in which plaintiff's employee, now deceased, was conducting himself at the *time of the collision and at which time said damages are alleged to have been caused*, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment, and discretion exercise, under like circumstances, and in relation to the same matters, unless the facts and circumstances shown upon the trial negative such presumption; and you should indulge in such presumption in his favor, unless the facts and circumstances developed on the trial negative such presumption."

The plaintiff has italicized the portion of the instruction asked which he claims expresses the law, and has italicized the portion in the construction given by the court, on its own motion, which he claims incorrectly expresses the law.

The instruction, as asked by the plaintiff, does not express the law as we understand it. The instruction asked says that in the absence of *direct evidence* as to whether he exercised proper care, the law presumes, etc. The law is that, where the party is shown to be dead, and there is no *eyewitness* to the manner in which he conducted himself at the time of the injury, a presumption arises that he was

exercising that care and caution that a man of ordinary prudence, judgment, and discretion exercises, under like circumstances, and in relation to the same matter, unless the facts and circumstances shown upon the trial negative such presumption. The instruction asked did not properly present the law.

The true rule is that, in the absence of an eyewitness, in the absence of any obtainable direct evidence as to what deceased did or failed to do by way of precaution at and immediately before the injury, the presumption that he, prompted by a natural instinct, was in the exercise of care for his own safety, obtains and this presumption is one of fact, and whether it is overcome by circumstances shown in evidence is for the jury to determine. But there is no presumption of law under these circumstances that one is exercising reasonable care for his own safety at any particular time. It is simply an inference from the observed fact that men usually and ordinarily do exercise care for their own safety.

The rule in this state has been and is that the burden of proof in cases of this kind rests upon the plaintiff to show that he did not, by his own negligence, contribute in any way to the injuries of which he complains, or to the conditions out of which the injury arose. The presumption is of fact. It is an inference of fact rather, drawn from the known and recognized fact that the instinct of self-preservation implanted in man, and, in fact, in all animal life, prompts them to avoid injury. As has been frequently said, "Self-preservation is the first law of nature." But experience shows that men do negligently and carelessly expose themselves to hazards and dangers. Therefore, this presumption that they did not is a rebuttable presumption. See *Golinvaux v. Ry. Co.*, 125 Iowa 652; *Sanderson v. C. M. & St. P. Ry.*, 167 Iowa 90. This presumption does not obtain where there is direct evidence in the case as to how the deceased was conducting himself at the time of the injury. The

jury is permitted to indulge in such inference of fact where there is no eyewitness to the transaction involving the conduct of the complaining party.

It would be improper for the court to say to the jury that if there is no *direct evidence* in the case as to how the party was conducting himself, they should indulge in the presumption that he was exercising reasonable care. Such a rule, if allowed, would be applicable in every case where the party having the burden of proof, on the question of contributory negligence, failed to introduce any direct testimony as to how the party injured was conducting himself at the time of the injury. Of course, if there is direct evidence as to how he was conducting himself, the presumption does not obtain, but the converse is not true that, if there is no direct evidence as to how he was conducting himself, the presumption does obtain. The burden being on the complaining party to prove freedom from contributory negligence, the absence of *direct evidence* as to how he was conducting himself does not raise the presumption in his favor, unless it appears that there was no eyewitness to the transaction, and, therefore, no obtainable direct evidence as to how he was conducting himself.

We think there was no error in refusing to give the instruction asked.

We come now to consider the instruction given. Does it correctly express the law? Does it give the jury fully the true rule by which it must be guided in determining the question of contributory negligence on the part of the deceased?

The burden of proof was on the plaintiff to show that the deceased was free from any negligence contributing to the injuries, and the conditions out of which the injuries arose. This the court emphasized in the instructions given to the jury. The court said to the jury that, in determining whether or not the plaintiff was guilty of contributory negligence, they should consider whether or not he looked and

listened for any approaching train before attempting to cross the track; whether or not, if he had looked and listened, he could have seen the oncoming engine and cars approaching from the east. They should consider the distance that the approaching train could be seen from the point where plaintiff was, at or about the time of its approach; whether the plaintiff's employee saw it or, in the exercise of ordinary care, should have seen the engine approaching from the east at the time; what the plaintiff knew of and concerning the movement of the engine before attempting to go upon the track. The court said to the jury that a view of a railway track conveys notice of danger, and that, as he approached it, it was his duty to use his senses of sight and hearing to guard himself from harm, and if the use of his senses of sight and hearing was interfered with by obstructions or noise, reasonable care called for proportionately increased vigilance on his part before going upon the track, and further said to the jury that no reliance on the exercise of care by persons in control of the train in respect to keeping a lookout along the track, or on top of the moving train, would excuse any lack of exercise of care on the part of the driver in looking and listening to ascertain if a train was approaching from the east, and that, if there were obstructions to his view as he approached the train, the duty of watchfulness for his own safety was proportionately increased. These instructions to the jury emphasized the error in the instruction touching the conduct of the deceased of which complaint is made.

It may be, and often is, true that at the time of the collision, at the time the damages were caused, the party is using all his powers, exercising the highest degree of effort and care to extricate himself from the predicament in which he finds himself, and the evidence might disclose that, at the time of the collision, and at the time the damages were caused, he was exercising the highest degree of care and effort to avoid the collision and the damages incident to the collision;

but it might also appear—and this would defeat recovery—that in approaching the point of collision, and in what preceded and led up to, and brought about the condition in which he found himself, at the time of the collision, he failed to exercise that care and caution which a reasonably prudent man would exercise for his own safety. He might have been grossly negligent in approaching the point of collision, and in placing himself in the situation from which no amount of vigilance then could extricate him. The burden of proof being on him to show freedom from negligence contributing to his injuries, it was necessary that it should appear, not only that he was not guilty of negligence at the time of the collision, but that he was not negligent in bringing about the conditions which made the collision possible. The court said to the jury that, where there are no eyewitnesses as to the manner in which the plaintiff's employee was conducting himself *at the time of the collision*, and at which time said damages are alleged to have been caused, the law presumes that he was exercising such care and caution as men of ordinary prudence, judgment, and discretion exercise under like circumstances, and in relation to the same matter.

There is direct evidence, evidence of eyewitnesses, as to how the deceased was conducting himself at the time and immediately before the collision, but the jury could have well found that, at the time, no effort on his part could have extricated him from the then situation; that at that time the collision was inevitable, could not be avoided. The presumption that he was free from negligence is confined by the instruction to the absence of eyewitnesses at the time of the collision. There being eyewitnesses at the time of the collision, then, under this instruction, there was no presumption in his favor, although dead, that he was free from negligence contributing to his injury. There was no eyewitness of the manner in which he approached the point of collision, no eyewitness as to whether he looked and listened for the approaching train. There being no direct evidence as to his

conduct leading up to the collision, and, under this instruction, no presumption that he was exercising care in approaching the point of collision, the jury might have reasoned as follows: At the time of the collision, there is no presumption that he was exercising due care for his safety, because there were eyewitnesses to his conduct at that time. The evidence offered and submitted on this point, we think, sustains the proposition that he was exercising all the care that he could exercise at that time. But there is no evidence offered by the plaintiff as to the conduct of the deceased prior to and leading up to the point of collision. There is no presumption that he was free from negligence, under this instruction, in approaching the point of collision. There being no presumption that in approaching he was free from negligence, and no evidence that he was free from negligence in approaching, and the burden being on him to show this, we cannot find, as a matter of fact, that in approaching the point of collision, in putting himself in a position that made the collision possible and inevitable, he was exercising reasonable care for his own safety, and this defeats his right to recover.

It is further true that, even in the absence of eyewitnesses, the facts and circumstances disclosed may absolutely negative and destroy any presumption of care on his part; that is to say, if it should appear from the facts and circumstances disclosed that, if the plaintiff had exercised that care for his own safety which the law requires, he could and would have discovered the approaching train in time to have avoided the injury by the exercise of proper care.

In considering instructions for the purpose of determining whether or not they correctly and fully express the law and give the jury a true rule to guide them in determining the issues, we must consider all the instructions, and when considered from that viewpoint, if the instruction complained of does not state the correct rule for their guidance, or leaves it open for speculation and argument as to what

the true rule is, it is bad; or, where it is apparent that reasonable minds might differ in the reading of the instruction as to what the rule attempted to be expressed is, or where it is susceptible of one construction consistent with the law and another construction which does not express the law, it is bad, for we cannot say which construction the jury placed upon it. We cannot say which line of reasoning suggested by the instruction the jury followed in determining the questions at issue. Such an instruction is essentially dangerous as a guide to the jury, and, therefore, not to be approved.

We think the court erred in this instruction touching the presumption, in limiting the presumption to the time of the collision. For this error, the case must be—*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

STATE OF IOWA, Appellant, v. FRANK HESS, Appellee.

BASTARDS: Bastardy Proceedings—"Not Guilty"—Taxation of

- 1 Costs. There must be statutory authority for the taxation of costs. Therefore, one who signs and verifies a complaint in bastardy entitled "State of Iowa vs.," as required by Sec. 5629 of the Code, the county attorney prosecuting as commanded by Sec. 5633 of the Code, and the prosecution failing, is not liable for cost. Such a person is not a party to such proceeding within the cost statute, Sec. 3853 of the Code, providing that the successful party shall recover costs against the losing party.

WITNESSES: Falsus in Uno, Falsus in Omnibus—Conflict of Evi-

- 2 dence—Singling Out Witness. The sole fact that the testimony of witnesses is in conflict affords no basis for arbitrarily singling out the testimony of one particular witness to the conflict and applying thereto the rule of evidence: "*Falsus in uno, falsus in omnibus*."

TRIAL: Instructions Fundamentally Erroneous—Necessity for Re-

- 3 quest. The error of the court in giving an instruction fundamentally wrong is not waived by the failure of the party injured thereby to ask a correct one.

BASTARDS: Instructions—Invading Province of Jury. It is funda-

4 mental that instructions must not invade the clear province of the jury to pass on disputed questions of fact. Instructions reviewed in bastardy proceeding and held to practically withdraw from the jury the question of defendant's guilt, and therefore erroneous under the state of the record.

TRIAL: Evidence—Natural Incidents of Case—Admissibility. Mat-

5 ters which are the natural incidents of a case are properly received.

PRINCIPLE APPLIED: Bastardy proceeding. Defendant, without objection, testified that he was married. He was then permitted to testify when he was married and that his former wife died twelve years ago. *Held*, being mere incidents of the case, plaintiff could not justly complain.

Appeal from Howard District Court.—HON. A. N. HOBSON, Judge.

TUESDAY, JANUARY 19, 1915.

REHEARING DENIED SATURDAY, MAY 15, 1915.

APPEAL from a judgment on a verdict of not guilty in a bastardy proceeding, and from a judgment against complainant for costs.—*Reversed*.

George Cosson, Attorney General, *John Fletcher*, Assistant Attorney General, *Joseph Griffin*, County Attorney, and *Reed & Pergler*, for appellant.

John McCook and *Frank Sayre*, for appellee.

SALINGER, J.—Proceeding in bastardy. The complaint is entitled State of Iowa vs. Frank Hess, and signed and verified by one Canfield, the mother of the girl, for the maintenance of whose child said proceeding was instituted. Verdict, not guilty. It is one complaint that the costs of trial were taxed to said Canfield.

I. The mother of the bastard will be referred to as the girl. Appellee relies on *McAndrew v. Madison County*, 67

Iowa 54, to sustain this taxation. In that case complaint was filed without authority from the district attorney; he first learned of it after it was filed, and he asked at the time of trial "to be relieved from assisting in the trial, which was acceded to by counsel for complainant, who tried and managed the case upon the part of the plaintiff." The case at bar has been and is being prosecuted by the proper officers of the state. While, abstractly, this difference might not be controlling, it does require consideration here. The right to recover costs rests on express grant, and whenever a prior judicial construction is invoked to enlarge such right, the judiciary is strongly inclined to confine the prior judicial allowance to the record facts of the case in which the allowance was made. This difference, then, does have material bearing here. *McAndrew's case* may well have been controlled by the thought that the county should not be liable for costs where, by the consent of all concerned, the public authorities retired, and the case was completely surrendered to private management.

If we assume that this difference will not warrant us in excluding *McAndrew's case* from our consideration, we yet may not give it an effect beyond what it decides. Stripped to its essentials, it declines to let a sheriff who served subpoenas in a bastardy suit which failed, recover costs of the county, upon the express ground that "It is very plain that the county is not liable for costs under Sec. 3790 (512) of the Code, for the simple reason that the proceeding is not a 'criminal case.' " It is not liable as a party in interest.

It decides that the county is not liable, not who is. A hundred judicial decisions confined to declaring that particular parties are *not* liable for particular costs would not determine that other parties are. So far as *McAndrew's case* is concerned, then, the question whether the taxation at bar can be sustained is left open.

"At the common law costs were not recoverable *eo nomine*. Costs can, therefore, be imposed and recovered only in cases where there is statutory authority therefor. While the power to impose costs must ultimately be found in some statute, the legislature may, nevertheless, grant the power in general terms to the courts which, in turn, may make rules or orders under which costs may be taxed and imposed; but the courts cannot make such rules or orders and impose costs thereunder unless the power to do so is expressly given them by statute." 11 Cyc. 24.

The *McAndrew case* attempts no broadening of this rule, and itself declares that "no official fees can be allowed except such as are expressly authorized by law."

The only statute warrant for the allowance of costs is Code Sec. 3853, that "costs shall be recovered by the successful against the losing party."

It follows that this taxation cannot be sustained unless we may find that Canfield was "the losing party." This question, too, we must resolve without aid from *McAndrew's case*. It decides nothing on this head except that the county is not such party, makes no attempt to say who is, and it rules that "no person can be compelled to pay costs in civil cases except parties to actions."

Meeting, then, the question whether Canfield is a party within the meaning of the cost statute, we find our Code to require that "The proceedings shall be entitled in the name of the state against the accused, as defendant," (Code 5629) and that (Code 5633) the county attorney is required to prosecute the matter in behalf of the complainant.

To hold that in a cause required to be entitled in the name of the state, which its officers are required to prosecute and manage, and which they do prosecute and manage, one who has signed and verified the complaint upon which they act thereby becomes a party to the bastardy suit within the meaning of the costs statute, would in our opinion do

violence to the letter and spirit of the statute. We reach this conclusion the more readily because the law deals strictly with the recovery of costs.

It is quite possible that if *McAndrew's case* is to rule, the present decision will leave the costs of a bastardy suit which fails unprovided for. But that is a matter for the legislature. We are not at liberty to impose costs upon particular persons merely because, else, services rendered would not be paid for. No recovery against a county is involved, wherefore we have no occasion to pass on whether the rule of the *McAndrew's case* is sound. Nor have we to decide whether costs, such as are involved in the present case, may be recovered at all. What we do decide is that the taxation involved is erroneous, even if such costs may not be recovered from the counties, and even though no provision may have been made for obtaining such costs, and that neither this situation or anything else is warrant for taxing these to Canfield.

II. In instruction eight, the jury is permitted to disregard the testimony of the girl if it believes from the evidence that she "knowingly, intentionally or wilfully testified falsely that defendant was present at the time she testifies she had sexual intercourse with him" and so believes "that at such time he was not in Cresco."

The additional statement that it is the sole judge "of whether her testimony has in this manner been destroyed, and will give it such, if any, consideration you believe it entitled to," merely makes plain that while the jury has the power to destroy this testimony if it believes as aforesaid, it is not compelled to exercise that power.

We have to decide whether the contention that this constitutes an improper discrimination against her testimony is sound.

We may concede that a record could furnish a foundation for the charge herein complained of, and appellee urges that *State v. Smith*, 61 Iowa 538, justifies its giving here.

2. WITNESSES:
false in uno,
false in omni-
bus: conflict
of evidence:
singling out
witness.

In that case we said: "We also think that the jury should have been instructed that if they believed the defendant had established he was not at home, or in the house, the night the alleged intercourse took place, and they believed the child was then begotten, they must find for the defendant, and, further, that his absence, if found to be true, was sufficient to warrant them in disregarding the whole of the evidence of the prosecutrix."

On the surface, this instruction authorizes disregarding all the testimony of prosecutrix if the jury believed the defendant had proven that he was not present at the time the child was begotten. But an examination of the case discloses that while the instruction is sound upon the whole record, it reaches the correct result on wrong lines. That record shows not alone that there was a naked conflict as to an alibi, but that the prosecutrix gave an account of the circumstances attendant upon the alleged acts of intercourse which is so utterly violative of reason and contrary to common knowledge as to afford a complete justification for submitting whether any of her testimony was worthy of credence. Instead of using the whole record as the basis for an instruction which that record justified, the instruction sets out but part of that record, and so bases itself on what does not warrant the instruction when it might have embodied a sufficient premise for the charge.

If *Smith's case* exhibited nothing but a difference as to where defendant was at a given time, that instruction might rule us now. But as seen, the *Smith case* so differed from this case in facts as that we have the question open, whether the mere fact that a witness differs from another warrants his being singled out by an instruction like the one at bar. For the case we are considering has nothing which warrants instruction eight, unless the fact that witnesses conflict is sufficient warrant.

The girl testifies that defendant had connection with her in Iowa, first within two or three days after August 15th

and next within a week or two thereafter. Roughly, this asserts intercourse here about August 18th and about September 1st. Others put defendant into Minnesota from August 8th on, until his arrival in Cresco on August 26th. Later, we shall consider whether this creates a conflict at all. See *Wendt's case*, 161 Iowa 122. But if we assume it does make one, does a record which at most exhibits such conflict warrant so singling out one side to the conflict? It seems to us an impossibility in logic to justify the disparagement of just one of two disputants because the one disparaged disputes the other. If such conflict authorizes the destroying of the testimony of the one, why does not fairness require a charge that it may have like effect upon the testimony of the other? If there was anything in the record to justify this instruction, it is equally justified as to those who disputed the girl. She was no more contradicted than contradicting. If her testifying that defendant was in Iowa may operate to impeach her because others say he was in Minnesota, then it was an arbitrary discrimination not to say that their testifying he was in Minnesota, though she said he was in Iowa, might operate to destroy the testimony of those who contradicted her. We find nothing to indicate that either witness swore to an untruth wilfully or intentionally, and are unwilling to hold that a clash in testimony is of itself sufficient for submitting such an instruction as was here given. But if such clash does suffice, it required the instruction to deal alike with all parties to such conflict. Nor should it be said that this singling her out was not arbitrary because the verdict shows she was not believed. It does not follow more was found than that she was honestly mistaken. And to claim more for it takes advantage of the very wrong done by the instruction. Where the trial judge declares there is occasion to inquire whether one witness has committed perjury as to where defendant was at a given time and that such inquiry permits the jury to disregard her testimony, and he is silent as to those who gave opposing testimony on the point, it

tends, at least, to greatly increase the chance of its being determined that the one singled out has wilfully sworn falsely. This one-sided charge had, as it seems to us, a tendency to eliminate a finding that the girl had merely fallen into error on dates, and it tended to prevent a finding that defendant was guilty although it appeared that intercourse was not had at the precise time fixed by her, if she fixed any precise time. And we are constrained to say that this was not cured by saying confusedly in another instruction (seven), that (1) the material question is whether defendant is the father of the child "as charged"; (2) that the precise day on which the child was begotten is not material, and (3) that it is not material what is the precise day of its begetting, providing it is believed from a preponderance that the intercourse was had "at a time within which pregnancy actually occurred, and that defendant is the father of the child." We feel that this language which, in part at least, is difficult to understand, did not offset nor affect greatly the clear-cut statement, that if the girl wilfully swore falsely that "defendant was present at the time she testifies she had intercourse with him and you believe from the evidence that at such time he was not at Cresco," it would justify "disregarding her testimony."

And the rule estopping complaint where no charge is requested has no application. That applies only where the charge is correct, but might well be amplified, clarified or more closely limited in application. If this instruction be erroneous at all, it is because it has no foundation in the record upon which to rest; and an appellant may take advantage of an erroneous instruction, though he did not offer one which if given would have corrected the error.

3. TRIAL: instructions fundamentally erroneous: necessity for request.

III. An analysis of instructions seven and eight is necessary if the two are to be construed together. We think they should be so construed, if that be possible. Such analysis is not alto-

4. BASTARDS: instructions: invading province of jury.

gether easy, but we think the following is a reasonably exact statement of these two instructions.

1. The material question is whether defendant is the father of the child "as charged."

2. While the precise day on which the child was begot is not material, this (its being immaterial) is so "providing" it is believed from a preponderance that intercourse was had "at a time within which pregnancy actually occurred and that defendant is the father of the child."

3. Find the defendant not guilty if the evidence shows he was not at Cresco "at the time Catherine Canfield alleges she had sexual intercourse with the man by whom and at the time she became pregnant."

4. If the evidence satisfies that she wilfully swore falsely that defendant "was present at the time she testifies she had sexual intercourse with him and you believe from the evidence that at said time he was not in Cresco," her testimony may be disregarded *in toto*.

This resolves into the following ultimate propositions:

1. Prosecutrix has alleged a time at which she became pregnant.

2. If defendant was not present at the time so fixed, the verdict must be in his favor.

This necessitates inquiry (1) when, if at all, did the girl fix the time of her conception, (2) what is there to show that defendant was away from her at the time she fixes, if she does fix such time, and (3) does it follow, as matter of law, that if she fixed such time and defendant was away at that time, defendant must be acquitted?

Under the testimony of and for the girl the jury could find that the first act was "during the latter part of August, 1912"; that it was two or three days after August 15th, and "not more than two or three days" after; that it was "five or six days after the 15th of August"; that the next succeeding act was about a week or two following two or three days after August 15th; that it followed in a week or two there-

after; that it was within a week thereafter; that illicit acts continued to the extent of five, six or seven times, and up to Christmas in 1912, and that the woman never had such commerce with any man other than defendant.

On the other hand, the jury might find that the defendant was constantly in Minnesota from August 8th up to about August 26, 1912, at which later time he returned to Cresco, and that he never had illicit relations with the woman. It is the testimony that the girl had her menses, she thinks, either the first or second week in August, 1912, and that the first time she missed her period was in September following.

It is plain that so far as fixing the times of intercourse goes, these could have occurred about August 18th, about September 1st, and consisted of from five to seven acts between September 1st and Christmas following. It is equally plain that pregnancy occurred sometime between the first and second weeks in August and sometime in September, and though it be found that defendant was away from August 8th and did not reach Cresco until August 26, 1912, it was, of course, possible for him to impregnate the girl on that day, or on September 1st, or in any of the other alleged acts occurring at some time between September 1st and Christmas. The child was born on May 20, 1913. It is testified that the usual term of gestation is 280 days from the last period. It is testified, and is common knowledge, that this varies, at least a few days. It appears that the girl was at work and that this often shortens the period of gestation. As said, even if the alibi was believed, the jury could find that intercourse was possible on August 26, 1912, between which and May 20, 1913, when the child was born, are 267 days. Notwithstanding that 280 days is the average or usual time, it is no impossibility that this gestation used 13 days less.

In the last analysis, the effect of the instructions is, that if a woman says her catamenia last appeared in the first or second week of August, that she had intercourse about August 18th, and about September 1st, that she missed her period

first in September, and that a child was born in 267 days after August 26th, defendant must prevail if he shows he did not have access to her between August 8th and August 26th. It amounts to holding, (1) that if the girl says there was intercourse about August 18th, and defendant shows he was away until August 26th, then defendant prevails, as matter of law; (2) if she fixes the act at about September 1st, defendant goes free by showing that though he was present then, he was absent up to four days earlier than September 1st; (3) and that a child born on May 20th cannot be the result of intercourse had between August 26th and September 1st preceding. We cannot assent to these. We think it was for the jury whether there was intercourse, when, and whether the child was the result of it, and that this is so, though the girl may have fixed the times of intercourse erroneously. It was not essential that they should have occurred at some particular time. (See *Wendt's case, supra.*) The instructions so say, yet, as a whole, they rule the contrary.

In *State v. Bell*, 49 Iowa, at 441, 442, the prosecutrix testified quite positively that the crime of defendant was consummated on the 7th day of July, the time charged in the indictment, at the house of a person named by her. The defendant introduced evidence tending to prove that he was not at the house named within three or four days of the time fixed by the prosecutrix. The instructions given to the jury were to the effect that if they found the crime had been committed on another day, yet within the time prescribed by the statute limiting indictments in such cases, it would be sufficient to authorize conviction. This instruction, and others, which left to the jury the determination of the time of the offense, are made the grounds of objection. We said:

“The error of counsel, in presenting these points, is this: They hold the jury bound to accept the testimony of the defendant's witnesses as conclusive as to defendant's absence at the time named, and that, if he was absent, the testimony

of the prosecutrix must be disregarded, and cannot be corroborated because of her error or mistake as to the day upon which the crime was consummated. But the jury were correctly required to reconcile this conflict of evidence, which may have been done by disregarding the testimony of defendant's witnesses, or by accepting it and finding that the prosecutrix had been innocently mistaken as to the precise day of the commission of the crime."

In *State v. White*, 99 Iowa 46, a verdict finding against an alibi, established in part, at least, by reputable witnesses, is sustained because, among other reasons, these reputable witnesses "may have been mistaken."

IV. Defendant testified without objection that he was married. Being then asked when he had been married, he answered, over objection that it was incompetent and immaterial, that it was on May 14, 1913, which is a day subsequent to the alleged act, and over the same objection he testified that his former wife died twelve years ago. This admission of testimony is objected to now on the ground that it was of a character to arouse the sympathy of the jury. Without the asking of these questions, it had appeared that defendant had visited his daughter, and therefore, presumptively, that he was a married man. The questions on this subject were natural incidents of the case, and in view of the whole record we find that there was no error in admitting the answers.

For the matters stated in divisions I, II and III of this opinion, the judgment of the district court must be and is reversed, and the cause remanded for a new trial.—*Reversed*.

DEEMER, C. J., LADD and GAYNOR, JJ., concur.

5. TRIAL: evidence: natural incidents of case: admissibility.

O. E. TOWNSEND et al., Plaintiffs, Appellants, v. E. E.
GARRETT et al., Defendants, Appellees.

SCHOOLS AND SCHOOL DISTRICTS: Consolidation—Notice of
1 **Election—Sufficiency.** Sec. 2746, Code 1897, does not require the
posting of five election notices in each of several independent
school districts which it is proposed to consolidate.

SCHOOLS AND SCHOOL DISTRICTS: Attaching Territory to Ad-
2 **joining District.** Sec. 2791, Code 1897, authorizing territory to
be attached to a school district under certain conditions, is man-
datory, in that any attempted annexation of territory, without
the order of the county superintendent, is nugatory.

Appeal from Davis District Court.—HON. C. W. VERMILION,
Judge.

SATURDAY, MAY 15, 1915.

SUIT in equity brought by the plaintiffs to test the legal-
ity of the proceedings of the organization of the Consolidated
Independent District of Troy named as defendant. The indi-
vidual plaintiffs are alleged to be residents and taxpayers in
the territory included in such district. They join as defend-
ants the purported officials of such consolidated district.
There was a decree dismissing the petition. Plaintiffs appeal.
—*Affirmed.*

Jaques & Jaques, for appellants.

Payne & Goodson, for appellees.

EVANS, J.—The Consolidated Independent School Dis-
trict of Troy was so organized as to include the territory of
four independent districts previously existing. These were
known respectively as the Independent Districts of Troy,
Walnut Grove, Stringtown, and Antioch. The proceedings

had purported to be in pursuance of Code Sec. 2794-a. The plaintiffs challenge the legality of the proceedings and therefore the legality of the organization of the consolidated district on two grounds:

(1) That the notice of election for the proposed consolidation was insufficient and illegal in that there was a failure to post five notices in each of the existing districts; and

(2) That only a part of the territory of the Independent District of Antioch was included and that the part of such district of Antioch which was excluded consisted of 354 acres and no more; and that therefore the Independent District of Antioch was reduced in its territory to less than 4 sections, in violation of the provisions of such statute.

I. Turning to the first ground of challenge, we have had occasion to consider the question in the recent case of *Schofield v. Independent School Dist.*, 169 Iowa 634. The opinion

1. SCHOOLS AND
SCHOOL DIS-
TRICTS: con-
solidation:
notice of elec-
tion: sum-
macy.

in that case was handed down since the taking of the appeal herein. Appellants frankly concede that such holding is conclusive against them on the first ground of their challenge, unless we should become convinced that such

case ought to be overruled. The reasons for our conclusion appear in the opinion in that case and we adhere to it without hesitation. We have no need to repeat the discussion.

II. The second point urged by appellants is that the territory of the former District of Antioch was included in the consolidated district only in part, and that the excluded

2. SCHOOLS AND
SCHOOL DIS-
TRICTS: at-
taching terri-
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trict.

part was less than 4 sections, as already indicated. On the other hand, the appellees contend that all the former District of Antioch was and is included in the consolidated district. The real dispute between the parties at this point arises over the question, What was the true south boundary line of such former district of Antioch? The

part was less than 4 sections, as already indicated. On the other hand, the appellees contend that all the former District of Antioch was and is included in the consolidated district. The real dispute between the parties at this point arises over the question, What was the true south boundary line of such former district of Antioch? The

contention of the appellees is that such independent district was located in Union Township and that its south boundary line was the south line of Union Township; and this is the line adopted as the south boundary line of the consolidated district.

The appellants concede that the principal part of the territory of the Independent District of Antioch was in Union Township and upon its south line. They contend, however, that it extended across such line into Prairie Township on the south and included 354 acres in Sections 4 and 5 of Prairie Township. The dispute at this point is one of fact. The records introduced are in great confusion and are inconsistent and contradictory in their various parts. The trial court found as a fact that the District of Antioch did not embrace land in Prairie Township. The result of this finding of fact was to hold that the entire district was included in the consolidated district.

In a written opinion filed by the trial court, the following discussion of the evidence appears:

“The first page of the record book of Antioch District bears a statement as follows:

“ ‘Sections and parts of Sections embracing the boundary of the Independent School District of Antioch No. 10, Union Township, Davis County, Iowa.’ This is followed by a description by government subdivisions, of land in Union Township, and certain lands in Sections four and five in Prairie Township. On pages eight and nine of this record book is found the following:

“ ‘The electors of the Independent District of Walnut Grove, Union Township, Davis County, Iowa, met according to previous notice given to vote on question of division of district ————. The votes all being cast in favor of separate organization at said meeting, the following described land was set off for the purpose of forming an independent district.’ Then follows a description of lands in

Union Township including all now conceded to have been in Antioch district, and then this: 'The following described land in Prairie Township was attached to the foregoing for school purposes. The northeast quarter of Section five, and the Northeast quarter of the Northwest quarter of Section 5, the Northwest quarter of Section 4, 14 acres off the West side of Southwest quarter of the Northeast quarter of Section 4.'

"It is to be noted the description found here and that on the first page of the book do not agree, either in respect to the land in Union, or that in Prairie Township. The entry is not dated, but following it, is one dated March 8th, 1880, which shows the organization of the new district, and the selection of the name Antioch.

"A plat book in the office of the County Auditor containing plats of school districts shows in pencil, on the plats of both Union and Prairie Townships, the plats themselves being in ink, the lands described in the above record as in Antioch district. One witness testified that the lands in dispute in Prairie Township belonged to Antioch school district.

"On the other hand, there is testimony from those long familiar with both districts to the effect that they never heard of any land in Prairie Township being in Antioch School District, and that the land in dispute had been regarded, and treated as a part of Pulaski district in Prairie Township. One hundred and sixty acres of the land in Section five, having been taxed in Pulaski district prior to 1880, was taxed in Union Township from 1880 to 1882, in Pulaski district in 1883 and 1884, in Union Township from 1885 to 1888, in Pulaski in 1889 and 1890, in Union from 1891 to 1894, and ever since in Pulaski district; and forty acres was taxed in Pulaski prior to 1884, in Union from 1885 to 1888, and ever since in Pulaski. The remainder of the land in controversy was taxed in Pulaski prior to 1880, and from then to 1888 in Union, and ever since in Pulaski. From this record one thing, at least, seems clear; that prior to 1880,

the land in Prairie Township, now claimed to be a part of Antioch district, was not a part of that district, or of any district out of which it was formed. It does not appear to have been a part of Walnut Grove district, which was divided by the setting off of territory to form the Antioch district, for it is not included in the territory so set off, but is said by the record to be attached to it for school purposes. From the payment of taxes in Pulaski district prior to that time the conclusion is warranted that it had been a part of that district. *District of Ottumwa v. Taylor*, 100 Iowa 617.

“The only way by which territory could be attached to an adjoining school corporation at the time of the organization of Antioch district was the same as that now provided for by Sec. 2791 of the Code.

“The County Superintendent, when, in his opinion, any of the inhabitants of a school corporation could not, by reason of natural obstacles, attend school in their own district with reasonable facility could, by written order in duplicate, attach the territory so affected to an adjoining school corporation, the board of the same consenting thereto.

“The only power possessed by the board of directors of Antioch district, or of Walnut Grove district at the time it was divided, in respect to adding territory from Pulaski district was to consent to an order made by the County Superintendent to that effect.

“What no doubt would have been effectual as such consent is shown, but nothing more.

“The action of the County Superintendent was essential. No presumption that he had acted should be indulged in—if it could be in any event—in view of the fact that during the greater part of the time since, and continuously for the past twenty years the territory has been treated as in Pulaski, and not in Antioch district. There is no doubt that some attempt was made to attach this land to Antioch district, and that it was thereafter for a time, considered a part of it. The entries in the record book referred to were doubtless

made, and the plats in the auditor's office changed in that belief. It is not, however, improbable that it was upon the discovery twenty or twenty-five years ago of the insufficiency of the proceedings for that purpose that the territory ceased to be treated as a part of Antioch district. At all events, I am clear, the court is not now required to find that the lands in dispute became a part of Antioch district upon proof of proceedings insufficient to effect the change, and where the action that was taken has been entirely disregarded by all interested for such a length of time. I conclude that no part of Antioch district is shown to have been left out of the consolidated district."

A careful examination of the abstracts satisfies us that the foregoing is a fair analysis of the evidence upon the disputed question and that the legal conclusion drawn therefrom by the trial court was correct.

It follows that both grounds of attack upon the legality of the organization must be denied. The order entered below is therefore—*Affirmed*.

DEEMER, C. J., PRESTON and WEAVER, JJ., concur.

EARL W. CANADAY, Appellee, v. IDA MAY BAYSINGER,
Appellant.

WILLS: Life Estate or Fee—Construction. The following will
1 grants to the wife a life estate only: "I bequeath to my wife
(certain named lands). I further wish her to have (certain
named lands), and after my wife's death it is my wish that
. . . the land be sold and the money be equally divided be-
tween my five heirs."

WILLS: Limitations—Consistent and Inconsistent—Effect. Limita-
2 tion on a bequest not inconsistent therewith must be given full
force and effect. *Held*, the above will contains no limitation
inconsistent with the bequest to the wife.

WILLS: Construction—Life Estate or Fee—Failure to Specify Fee.

- 3 In determining whether a devisee takes a life estate or a fee, it is material to notice (a) whether the testator has specified the particular estate which the devisee is to take, and (b) whether the power of alienation has been expressly or impliedly granted.

Appeal from Warren District Court.—HON. J. H. APPLE-GATE, Judge.

MONDAY, MAY 17, 1915.

PROCEEDINGS brought in partition and for the construction of a will.—*Affirmed.*

Berry & Watson, for appellant.

F. P. Henderson, for appellee.

GAYNOR, J.—This is an action brought by one of the heirs of David Canaday, deceased, for the partition and sale of certain real estate, and for the purpose of establishing and determining the respective rights of each in the same, and for a decree quieting the title of plaintiff therein, against the claims of Mary, Enos and Millie Swafford, Ida May Baysinger, and Wm. Baysinger.

David Canaday died in March, 1879, and left a will which is hereinafter set out. His widow, Eliza Canaday, survived him, and died in March, 1913. The appellant, Ida May Baysinger, was a daughter of David and Eliza Canaday. The petition charges that by the terms of the will, the widow, Eliza, took only a life estate in the premises mentioned in the will; that, after the death of David Canaday, and before the death of Eliza, Ida May Baysinger, Enos and Mary Swafford, by quit claim deed, conveyed all their right, title and interest in the premises to George G. Canaday, a son of David Canaday; that George Canaday died on the 31st day of March, 1913, and the plaintiff is his only heir at law.

Ida May Baysinger, the appellant herein, was a daughter of David and Eliza Canaday. She claims an interest in the

land as an heir of Eliza. She bases this claim on the theory that the will gave to Eliza an absolute title to the land; that the quit claim deed made by her to plaintiff's ancestor conveyed to him no title because she then had none to convey; that as the heir of Eliza, she is entitled to it. She demurred to plaintiff's petition, and the demurrer places in issue the allegation that the widow took only a life estate. The issue, therefore, to be determined herein, and which is decisive of the controversy, is, Did Eliza Canaday take a fee simple title in the premises under the will, or did she take only a life estate? If she took only a life estate, the fee vested in the heirs of David Canaday, subject to the life estate, and vested immediately upon the probate of the will, which related back to the time of the death of David. Ida May Baysinger's quit claim deed would therefore convey her interest in the fee, subject to the life estate. If Eliza took a fee under the deed, then Ida May Baysinger acquired nothing until the death of Eliza, and whatever rights she acquired would be as the heir of Eliza Canaday, and this right having come to her after the execution of the quit claim did not inure to the benefit of her grantor in the quit claim.

Ida May Baysinger alone challenged the allegation of the petition by demurrer. Her demurrer was overruled, and a decree entered quieting the title in the plaintiff as against her. From this ruling she appealed.

The will, which we are required to construe and by which the rights of these parties must be judged and determined, is as follows:

1. **WILLS:** life estate or fee: construction.

"I, David Canaday, of Richland Township, Warren County, Iowa, I am of feeble health but of good mind. Do this day make this my last will and testament, that is to say after my death, I wish my funeral expenses and debts all paid by selling my personal property and one piece of land, viz., 23½ acres in the south end of the Northwest quarter of the Northwest quarter of Section Seven, Township Seventy-seven,

North of Range Twenty-two, west of the 5th P. M. I bequeath to Eliza Canaday, my wife, the piece of land or rather the place that we live on, beginning at the Southeast corner of Section Twelve, in Township Seventy-seven, North of Range Twenty-three, west of the 5th P. M. and running south 60 rods; thence west eighty rods to a starting point; thence North 44 rods; thence West $54\frac{1}{2}$ rods; thence South 44 rods; thence East to place of beginning, containing 15 acres more or less. I also wish her to have a choice milch cow. I further wish her to have the west half of the southeast quarter of section Twelve, Twp. 77, North of Range 23, W. also commencing at the Southeast Corner of the West Half of the Southeast Quarter of Section Twelve, Twp. 77; Range 23 W. thence West $53\frac{2}{3}$ rods; thence fifteen rods south; thence $53\frac{2}{3}$ rods east; thence fifteen rods north to the place of beginning. Section 13, Tp. 77, Range 23 west.

"I also wish my wife to have all the household and kitchen except two beds and bedding for my daughter, Ida May, after my wife's death it is my wish that the remainder of the household and kitchen furniture be sold and the land also to (be) sold and the money to be equally divided between my five heirs."

The action of the court in overruling the demurrer of Ida May Baysinger was predicated upon the theory that Eliza Canaday took only a life estate in the land mentioned in the will, and that the fee vested in the heirs of David, subject to this life estate. We are asked to construe this will and say whether or not Eliza Canaday was, by the terms of the will, vested with the fee, or whether, under the will, she took only a life estate.

It is well settled in this state now, and is in other states where the question has been before the courts, that the intention of the testator is controlling. At the time of the making of the will, he is the owner of the property, and has a right under the law to make such disposition of it as he thinks

best and desires. The right to dispose of it as he sees fit and to whom he sees fit, has no limitation except that by a will he cannot dispose of those rights given by statute to the widow, and providing the disposition is not immoral or against public policy.

None of these questions are involved here. There is no question, from a reading of this will, that the testator intended by the will to dispose of all his property to someone mentioned in the will. We are only concerned with the disposition made of the real estate. As to this, he intended to and did dispose of all to take effect upon his death. The question is, Did the widow take a limited estate with devise over to his heirs? The contention of the plaintiff is that she took a limited estate, limited to the duration of her life, and that the remainder over passed to the heirs of David Canaday. As has been frequently said, the intention of the testator is the polar star in the interpretation of a will. The will may be ever so inartistically drawn: it may be even ungrammatical in its terms, yet if, from the whole will, taking all the parts together, and giving them full consideration, the court can determine what the intent of the testator is, that must prevail. Of course, there are certain recognized canons of construction which have their foundation in reason and experience. These the courts must recognize and enforce, not for the purpose, however, of defeating the intent of the testator, but for the purpose of aiding in the ascertainment of the intent. Thus, where a clear devise is made to one party without limitation, giving to him the full fee with power of alienation, any provision in the will subsequently made, which, if recognized, defeats that clear and clearly expressed intent, cannot prevail. It is said to be repugnant to the first clear and unequivocal expression of the mind of the testator. Some courts have said that there are some things that even a testator cannot do; that is, he cannot cause a thing to exist and not exist at the same time, and in the same instrument. In the physical world, we are told that two bodies cannot

occupy the same space at the same time. Where the words create, in the first place, an estate in fee in one and vest him with full title and power of alienation, any later expression which would destroy, nullify, or expunge that which has been done must be held ineffectual because they both cannot stand. A thing cannot be and not be at the same time.

The rule which has been adopted in the construction of wills is that the first taker to whom the testator has given the estate in fee, with full power of alienation, must be considered the absolute owner, as against any later provision of the will which would destroy or nullify the first. The limitation over is held void for repugnancy.

2. WILLS: Limitations: consistent and inconsistent: effect.

It has been frequently held that the written instrument must be considered as a whole; that the order in which the will of the testator is paragraphed is not controlling, except as above indicated, to wit, where the latter clause is repugnant to the preceding clause, and, if given force, destroys that which precedes. So it follows that, unless the succeeding clauses are necessarily repugnant and destroy that which precedes, every part must be given full force in determining the intent of the testator.

As said in *Law v. Douglass*, 107 Iowa 606, "Unless the provisions of the will are necessarily repugnant, there is no reason why the intention of the testator should not govern."

We might add that the intention of the testator must always govern; but where the testator has made two provisions in his will, one of which is repugnant to the other, both cannot stand, and the presumption is that the first provision expresses the will of the testator, and the second, being repugnant to that, must fall. So the court looks to the first provision for the intent of the testator, and rejects the second provision. This is done under the assumption that the testator knew the rules governing the construction of wills, and knew that, under the canons of construction, the first pro-

vision must be held to have expressed his intent, and that the second provision is nugatory, being inconsistent with and repugnant to the first provision. So, in either event, the intent of the testator must prevail, but that intent is ascertained from the whole will, subject, however, to this recognized canon of construction.

This brings us to the consideration of the will itself. So far as this record shows, the will is all in one paragraph.

3. WILLS: construction: life estate or fee: failure to specify fee.

The first part of the will provides: "I bequeath to Eliza Canaday, my wife, the piece of land, etc. . . . I further wish her to have certain land, etc. . . . After my wife's death, it is my wish that the land be sold and the money be equally divided between my five heirs."

The bequest to his wife creates no particular estate in the wife by its terms. There is no provision that she takes a fee or an absolute title, or that she is given the power of alienation. There is nothing to indicate the estate intended to be invested in the wife. Without further limitation upon this bequest, or rather devise, it might be construed into an absolute devise; but, with a limitation which is not inconsistent with the estate created, we are of the opinion that the testator intended, by what he calls a bequest or a wish, to give to the wife only such an estate as would terminate upon her death, and that upon her death the land be sold and be equally divided between the heirs.

Where the will is capable of such a construction as gives to all the parts of the will the full force which the language imports, it must be so construed. Where the testator in the devising clause to the first taker has not so designated the estate intended to be devised that the remainder over would be repugnant to the devise, then both would be permitted to stand. To hold that the first part of the will gave to the wife an absolute fee, with power of alienation, would be to add to the provisions of the will itself, and would, of course, render the latter clause repugnant to such a devise; but to

hold that the first part of the will, not having designated the particular estate intended to be devised, and not having by express provision indicated the estate intended to be created in the wife, from which power of alienation might be inferred, and not having by express words or necessary implication given to her the power of alienation,—the devise of the remainder over is not inconsistent with such provision, and therefore both may stand and each be in force.

The estate devised to the wife is indefinite and uncertain. Its scope and limitation are not fixed in the will. If the testator intended to give her a fee with power of alienation, he has not said so in the will. In the last clause of the will, he has indicated his intent in making the devise, to wit, that upon her death it should be sold and the proceeds divided among his heirs. This is a clear expression of an intent on his part to limit the estate vested in his wife to a life estate. There could be no remainder for sale and disposition at her death, if the construction contended for by the defendant were to prevail. Therefore, we would be compelled to enlarge the provisions of the will in favor of the wife, and to give it a larger scope than the testator has given it in the will itself, and we would be compelled in so doing to render nugatory the clear and unambiguous expression of testator's intent that upon her death the land should be sold and divided among his heirs. To hold that she had only such an estate as would continue during her life and such as would terminate upon her death gives to the last clause, directing the sale and division among his heirs, its full force. This gives to all the terms of the will their full force and effect, without destroying either, neither provision being necessarily inconsistent with the other.

As supporting these conclusions, see *Law v. Douglass*, 107 Iowa 606; *Iimas v. Neidt*, 101 Iowa 348; *Richards v. Richards*, 155 Iowa 394; *McTigue v. Ettienne*, 155 Iowa 450; *Boekemeier v. Boekemeier*, 157 Iowa 372; *Elberts v. Elberts*, 159 Iowa 332; *In re McRae* (Mich.), 146 N. W. 265; *In re*

Gray's Estate (N. D.), 146 N. W. 722; *Stender v. Stender* (Mich.), 148 N. W. 255.

Under these decisions we think the demurrer was properly overruled. The case is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

CHARLES STEINFORT, Appellee, v. SAMUEL LANGHOUT et al.,
Appellants.

FRAUDULENT CONVEYANCE: Creditor Taking Conveyance—

- 1 **Good Faith Demanded.** A creditor of an insolvent debtor may, if he acts in good faith, that is, *solely to protect himself*, take a conveyance from such debtor, even though he has full knowledge that the debtor is giving the conveyance in order to defeat some other creditor. But such good faith is the full limit of his right. He must remember that the law strikes hard at a fraudulent state of mind. If, while protecting himself by taking the conveyance, he intermingles the motive and intent to assist the debtor in his scheme to defeat the other creditor, he will find himself stripped of the protection which the law otherwise would accord to him.

FRAUDULENT CONVEYANCE: Adequate Consideration—Effect

- 2 **When Fraud Shown.** The fullest and most adequate consideration paid will not save a conveyance from being declared fraudulent when made with the intent, on the part of both grantor and grantee, to defeat the creditors of grantor. Fraud poisons and taints every transaction.

PRINCIPLE APPLIED: A father took a conveyance from his son covering all the property owned by the son except household effects. At the time, there was pending a motion for a new trial in a cause wherein a verdict for \$1,000 had been returned against the son. The son owed the father a bona fide debt of \$1,500, and \$1,440 to other parties. The father took the conveyance in full payment of his claim and executed his personal notes to the son's creditors to the amount of \$1,440. The \$2,940 was the full value of the property. The conveyance, as shown by the evidence, was made for the purpose, on the part of both father and son, of defeating the collection of the judgment. *Held*, fraudulent and void, even though the consideration was adequate.

Appeal from Sioux District Court.—HON. WM. D. BOIES,
Judge.

MONDAY, MAY 17, 1915.

ACTION to set aside a sale of personal property on the grounds that it was made for the purpose of hindering, delaying and defrauding creditors. Decree for the plaintiff. Defendants appeal. *Affirmed.*

Geo. T. Hatley, for appellee.

Van Oosterhout & Hospers and *Gerrit Klay*, for appellant.

GAYNOR, J.—This action is brought in equity to set aside a certain bill of sale executed by the defendant, Samuel Langhout, to Henry Langhout on the 3d day of October, 1912.

Samuel Langhout is a son of Henry Langhout, and, at the time of the making of the bill of sale, resided on a farm owned by his father, Henry. The property covered by the bill of sale was, at the time of its execution, in the possession of Samuel Langhout, and consisted of horses, colts, cows, calves, shoats, chickens, farm machinery, buggies and wagons, three sets of harness and about sixty acres of corn in the field. The facts and circumstances attending and leading up to the making of this bill of sale will be hereafter referred to in detail.

1. FRAUDULENT
CONVEYANCES:
creditor taking conveyance: good faith demanded.

The plaintiff's right to maintain this action is based upon the fact that on the 11th day of November, 1912, he obtained a judgment in the district court of Sioux County, against the defendant, Samuel Langhout, for \$1,000.00 with costs; that on that date an execution was issued against Samuel Langhout, and was returned by the sheriff with the words endorsed thereon, "No property found." Thereafter, and on the 16th day of November, 1912, an order was issued by the judge of the district court, upon proper showing, requiring the defendants, Samuel and Henry Langhout to

appear for examination in proceedings supplemental to execution.

They appeared before the court and were examined and their answers at that hearing made a part of this record. The trial court found for the plaintiff, finding that the bill of sale was fraudulently made, and for the purpose of hindering and delaying the creditors of Samuel Langhout, and especially this plaintiff, and subjected the property so conveyed in the bill of sale, in the hands of Henry Langhout, to the payment of plaintiff's judgment. Defendants appeal.

This is a fact case. There can be and is no serious controversy as to the law that governs the rights of the parties in a controversy of this kind.

The action in which the judgment against Samuel Langhout for \$1,000.00 was entered was tried at the September term, 1912. On the 13th day of September, the jury returned their verdict. Thirty days were given to the defendant in which to file a motion for a new trial. No motion for a new trial was filed until the 8th day of November, 1912. On the 11th day of November, the motion was stricken from the files and judgment entered against the defendant, Samuel Langhout, for \$1,000.00, with six per cent interest from the 13th day of September, 1912, and costs amounting to \$120.85.

It was during these thirty days given by the court to the defendant for the filing of a motion for a new trial that the bill of sale was executed. It appears that the bill of sale covered all the property owned by Samuel Langhout, except his household goods and furniture.

At the time of the execution of the bill of sale, the record shows that Samuel was indebted to his father on a note of \$700.00, with interest, amounting to \$722.00. This note was secured by mortgage. He was also indebted to him in the sum of \$800.00 for rent due on the place then occupied by Samuel. This was all that was due Henry from Samuel at the time of the making of the bill of sale. The consideration in the bill of sale was fixed at \$2,940.00. The

balance was paid in this way—Samuel was indebted as follows: to his sister, Agnes Langhout, \$600.00 on a note dated February 25, 1910, due February 25, 1911, bearing 8% interest; to his brother, David Langhout, \$400.00 on a note dated January 28, 1912, and due October 28, 1912, bearing 8% interest; to Frank Dykstra, his brother-in-law, \$250.00 on a note dated May 10, 1912, due May 10, 1913, bearing 8% interest, and to his attorney, Gerrit Klay, in the sum of \$500.00.

At the time of the making of the bill of sale, these obligations were disposed of by Henry in this way: Henry receipted to Samuel for the amounts due to himself, took up the obligation due Agnes Langhout by executing to her his personal note, dated October 12, 1912, for \$720.67, due October 1, 1913, bearing 8% interest; took up the note due David Langhout by executing to him a note for \$400.00 dated October 3, 1912, with 8% interest from February 28, 1912; took up the note due Frank Dykstra by executing to him a note for \$257.78, dated October 1, 1912, and due October 1, 1913. The \$800.00 obligation for rent was disposed of by executing the following receipt to Samuel:

\$800.00

Orange City, Oct. 3, 1912.

Received of Samuel Langhout \$800.00, being rent for 1912 on Northwest Quarter 32-97-45.

Samuel Langhout testified that these notes were fixed up in the attorney's office. "Mr. Klay and my father and my brother David were present. This was the time we drew the bill of sale."

David testified that, at the time the bill of sale was drawn up, he had with him his note against Samuel and also his sister's note; that the father took up these two notes and delivered to him his personal notes, payable one to himself, and one to Agnes, for the amount of their several notes. "My sister gave me her note for collection. I took father's note in lieu of her note and delivered father's note to her

about a week later at Sioux City, and about two weeks later I bought the note from my sister. My sister was going away and had to have the money. I accepted the new note that my father gave me in lieu of the one I held against Samuel. I also accepted a new note, signed by my father, in lieu of the old note which my sister had against Samuel. I appraised the property before the bill of sale was made. My father asked me to appraise it. He phoned me from Orange City. He said he wanted to find out what it was worth. This was some time before the bill of sale was made. When he phoned me to come and appraise it, I supposed he wanted to buy the stuff. I found that the bill of sale was to be made on the 3d day of October, the day it was given. I just happened to be up there."

There is some further testimony from David to the effect that he intended to press the collection of the note, had it not been adjusted in this way.

Frank Dykstra testified that he was not at Orange City at the time the bill of sale was made; that he had no talk with Henry Langhout as to how the note should be changed. He told Samuel he wanted it paid when he heard of the verdict. It was after the bill of sale had been made that Henry handed him the new note, and said that he took up the old one. This was about a week or two after the bill of sale was made.

He further testified that the first thing he knew about Henry's giving a note to him in lieu of the note he had against Samuel was when Henry phoned him to send the old note. It was then that he found out he had taken it over; that he did not tell him when he phoned what he was going to do. It was a couple of days before the bill of sale was made that he telephoned for the old note; that he had heard something about giving a bill of sale, and that the making of the new note and the taking up of the old note was done without his knowledge; that he had the old note in his possession at the time the bill of sale was given and did not

know that his father had executed a new note in his favor, until he delivered it to him about a week or so after the bill of sale was made.

The above facts indicate the manner in which the deal was begun and consummated, which resulted in the giving of this bill of sale to Henry on the 3d day of October, 1912, transferring to him substantially all the property of Samuel.

On the question of the knowledge and intent of the parties in entering into this deal and consummating it in the way they did, the record discloses that in the proceedings supplemental to execution, Henry Langhout testified: "I took a bill of sale of everything my son owned except his household goods. I let him keep them. All this property described in the bill of sale is now on my farm at Perkins, the same place it was before the bill of sale. I left it in my son's possession."

He was asked touching his reasons for giving the bill of sale and he stated:

Q. "Why did you take this bill of sale?"

A. "Well I told you, the boy came over to my house and says, 'Father, you got a mortgage on my goods for \$700.00, and you have \$800.00 rent coming and you know I am sick.' And he says, 'I have got a little debt, and the first year I had no crop and last year nearly no crop on account of so dry, so I am in debt. You know I had of my sister \$600.00 to buy furniture and some tools,' and he says, 'I owe another girl for labor and for the buggy, and I can't work by the day because I am sickly and I can't pay the people, so wouldn't you buy the business out and pay the bills and pay my notes?' So I said, 'That is all I can do.' So I told my son to come and appraise the cattle and told Robyn if he would appraise the horses and appraise them honest so as to get the value of the goods."

Q. "When did he come to you and tell you this?"

A. "The day we made the bill of sale. He told me a

little before and he came afterwards and made the bill of sale; a few days before we made the bill of sale."

Q. "You say it was a few days before you took the bill of sale that he suggested you buy him out?"

A. "Sure."

Q. "How many days before?"

A. "I hardly know particularly. He came on account his health was bad."

Q. "Just answer my questions, please."

A. "Yes sir, I will."

Q. "I am not doubting your word at all, I just want to see what arrangements you had with him. How many days after he spoke to you did he see you about this?"

A. "I could not particularly tell."

Q. "It was only a few days?"

A. "Yes, it was not long."

Q. "Did you go out there or did he come to Orange City?"

A. "They had to go out there first, out there to see the stock."

Q. "Where was the bill of sale drawn?"

A. "Right here in Orange City."

Q. "Who drew it?"

A. "Mr. Klay."

Q. "You say you had a mortgage against your son?"

A. "Yes sir."

Q. "Have you that mortgage here?"

A. "No, sir; I have not I think."

Q. "You were not afraid that Sam was going to run away, were you?"

A. "No, I am not afraid of that. Sam is an honest boy."

Q. "You did not buy out because you were afraid he would run away?"

A. "No sir."

Q. "That he would not pay you?"

A. "I was afraid he was not able to."

Q. "His sister was not bothering him for money, was she, or was she?"

A. "The note was quite overdue."

Q. "But she was not bothering him?"

A. "No, but she took a homestead in Colorado and told me she needed the money. When I paid my daughter, she gave back Samuel's note. I gave her another note. I told her I did not have the money then. I think this note ran six months. She said she needed the money in six months, something like that. I gave the note she gave me to Sam."

He further testified: "If I had not taken the bill of sale and no new trial had been granted, the children would probably have taken Sam's property. They sue him, and maybe sold the business and make trouble. The sheriff would probably have sold Sam's property, I don't know."

Q. "You didn't want that done, did you?"

A. "I wanted him to pay his debts. I didn't want the sheriff to sell the property if I could honestly help it. I was going to keep him from doing it if there was any honest way to do that. I figured out this was the best way to do. I figured out that I should buy the stuff and pay Sam's debts, what I could reach of them."

Q. "You knew that the sheriff would sell Sam's property?"

A. "I did not know. I didn't say that, but I say I thought I buy honest and square and pay his debts if I could, and told him not to hide anything and pay up his honest debts."

Q. "You don't think this judgment of \$1,000.00 was an honest debt?"

A. "I don't say that. That isn't my business. If you had it against me I might say yes or no."

He further testified: "I could not go to the Supreme Court with Sam's case because I have no money, so I bought the property and paid his debts so far as I could. I told

him I had better buy him out and then he could work for me. He was to work for me one year at \$50.00 per month. If I had not taken the bill of sale I suppose the sheriff would have sold Sam's property. I did not want that done if I could help it."

Samuel Langhout at the same hearing testified: "I gave the bill of sale on the 3d day of October, 1912."

Q. "What did you do that for?"

A. "Because I was afraid in this case that if I left it run they would sell me out, and I would be out of an occupation as I am not very strong and cannot do a day's work, and never done anything but farm, so I was afraid in that case I would be turned out of house and home, and I have a wife and two children I have to support, and I thought it was my duty to look after them. I knew if I took the case to the Supreme Court it would take a good deal of money and as long as I don't have anything, I thought it would be better to fix it this way, and I would be able to work for father, and have an income so that I could support my wife and children."

He was asked this question: "You knew if you didn't sell to your father, the sheriff would jump on to it?"

A. "Yes, I knew that, and it would put me out of occupation."

Q. "And in order to keep the sheriff from doing that you deeded it to your father?"

A. "Yes, sir. I knew if the thing went ahead and I got no new trial that the sheriff would get the property. I had several small children at the time and I owed my father \$1,500.00 and I owed my sister, my brother and my brother-in-law."

The note held by the father against Samuel, heretofore referred to, was not due until August 12, 1915.

This is all the testimony material to a full understanding of the situation and the mental attitude of these parties

towards the transaction, and the intent and purpose they had in view in making the bill of sale. The time, the place, the circumstances, the conditions, what was done, and the apparent necessity for quick action, and the motive that prompted them to take action, the purpose to be accomplished by their action, are all made apparent.

The note held by the father against Samuel was not due. It had almost three years to run. The rent was for the year 1912. We are not inclined to believe that the brother, the sister or the brother-in-law were urging payment at that time. We are satisfied that this transaction would never have taken place had it not been for the fact that Samuel and his father thought best, in the interest of Samuel, that the property be placed beyond the reach of an execution in favor of the plaintiff herein; that the purpose and object of making the bill of sale was to place the property beyond the reach of an execution in the event that a judgment should be entered in the plaintiff's case and execution issue thereon.

There is no claim of exemption made by either party, and no evidence as to what, if any, property conveyed was in fact exempt. The only defense urged by the defendant Samuel is that his father paid the full market value of the property; that while he knew, at the time the bill of sale was executed and the property sold, it would have the effect of postponing the collection of plaintiff's judgment and prevent the immediate collection thereof, he had no intention, at any time, to hinder, delay or defraud the plaintiff in any manner; that he simply sold it in good faith, upon advice of counsel, and in an honest belief he had a right to so do in payment of valid existing debts.

The only affirmative defense pleaded on the part of Henry is that he purchased the property in good faith for the full market value and without any knowledge, on his part, of any intention on the part of Samuel to delay, hinder, or defraud his creditors, and that this defendant had no such intention. While he knew Samuel to be insolvent at the

time, and that the effect of the sale would be to prevent immediate collection of plaintiff's judgment, he purchased the property honestly, in good faith, and under the belief that it was not inconsistent with the laws of the state. This presents the real issue.

The appellant's first contention is that fraud is never presumed; that the burden of proof is on a creditor who seeks to set aside a transaction of his debtor as fraudulent to prove that the sale was made with a fraudulent intent; that is, that it was made with the intent to hinder, delay or defraud creditors. This contention is true, and needs no citation of authorities to support it.

The second contention is that the plaintiff wholly failed to prove fraud in the transaction, and therefore has not satisfied the burden of proof which the law places upon him. This is a question of fact and not of law, and must be determined from the record hereinbefore set out.

The third contention is that mere suspicion of fraud is not enough, in itself, to justify the setting aside of a conveyance, where the conveyance is supported by an adequate consideration. This also is true. Fraud is never presumed, but the existence of it must be established affirmatively by the one who charges it. If the evidence creates only a suspicion as to the existence of the fraud, it is insufficient to justify a finding of the existence of fraud in fact. See *Stewart Bros. v. Mills County Bank*, 76 Iowa 571; *Smith v. Mack*, 94 Iowa 539.

The fourth contention is that fraud is not presumed from the mere fact of family relationship between the parties to a transaction. This is also true. See *Mahaska County v. Whitsel*, 133 Iowa 335.

The fifth contention is that the fraudulent intent of both grantor and grantee, vendor and vendee, must be proven before a transfer of property will be set aside on the ground of fraud. This is partly true, partly not true. Where one makes a transfer of his property, with intent to defraud

creditors, to one to whom he owes no obligation to make the transfer, and to whom he is not in any way indebted, the party to whom the transfer is made cannot hold the property as against creditors, even though he pay a consideration, if, at the time of the transfer, he knows that the intent of his vendor in making the transfer is to hinder, delay, or defraud creditors. See *Rosenheim v. Flanders*, 114 Iowa 291. This case involved a question of fraudulent transfer of personal property. The court said: "Two questions are presented by the facts for solution. First, was the sale by N. M. Flanders to her brother, made with intent (on her part), to hinder, delay, or defraud plaintiffs? Second, if there was fraud on her part, what was the relation of J. W. Flanders (the vendee) to the transaction? Was he a creditor, merely seeking to secure his claim, or was he in the nature of a purchaser endeavoring to make profit out of the property?" The court answered these questions in the following language: "If the sale was made by N. M. Flanders with intent to hinder and delay the plaintiffs, it was fraudulent on her part, and could be avoided against any purchaser from her, even though he paid full value, if such purchaser bought with notice, either actual or constructive, of the grantor's intent," citing *Steele v. Ward*, 25 Iowa 535; *Kellogg v. Aherin*, 48 Iowa 299, and other cases. It was there said: "The grantee, in such a case, will be held to have constructive notice of the grantor's intent, when he knows of such facts as would put men of ordinary prudence upon inquiry, which, if pursued, would lead to a knowledge of the grantor's purpose," citing *Jones v. Hetherington*, 45 Iowa 681, and other cases. The court proceeds: "This is the rule with regard to a purchaser, but it does not apply to a creditor seeking security for his claim."

Where the sale is made to a creditor of the alleged fraudulent vendor, and is made in satisfaction of a bona fide debt, and is done in good faith, in payment of the debt, other creditors cannot complain, even though it appear that the

vendor had a fraudulent purpose in making the transfer, and even though the vendee knew of this fraudulent purpose. This rule is founded on the fact that a creditor has a right to take security for, or payment of, a just debt, even though he knew at the time that his vendor had a fraudulent purpose in making the payment at that particular time. But to this there is an exception, that if the purchaser though a bona fide creditor, knows of the fraudulent intent of his vendor or mortgagor, and with such knowledge takes the conveyance not in good faith, for the purpose of securing or paying his debt, but for the purpose of aiding his vendor or mortgagor in his effort to defraud other creditors, he cannot be protected. The rule generally is stated this way: A creditor who acts in good faith may take security from his creditor or a conveyance of his property in payment of a bona fide debt, even though he knows that there are other creditors, and that the effect of the debtor's action will be to defeat them, and he is protected in such case, even though he knows the debtor is prompted by a fraudulent intent. But the rule stated farther is that the creditor must act in good faith; for, if he makes the purchase for the purpose of aiding his debtor to defraud other creditors, it is void, even though he pays full consideration therefor. See *Richards v. Schreiber et al.*, 98 Iowa 422. This rule is stated in the above case as follows: "But if the creditor know of the fraudulent purpose of the debtor and accept the mortgage wholly or in part to aid in accomplishing it, he participates in the wrong, and the mortgage is fraudulent against creditors, although it was only on a reasonable amount of property to secure a valid debt," citing *Headington v. Langland*, 65 Iowa 276; *Clark v. Raymond*, 86 Iowa 661.

In *Richards v. Schreiber*, *supra*, it was said, in substance, that the mortgagor may have believed that it was for the best interest of his creditors to place the property beyond the reach of attachment until he could realize its value in the ordinary course of business and pay his debts, and the mort-

gagee may have shared in this belief, but this did not prevent the transaction from being fraudulent in law, and it was said that the purpose of the mortgagor in giving the mortgage, as disclosed by the record, was to hinder and delay his creditors; that the mortgagee knew of that purpose and took the mortgage to aid in carrying it into effect. That tainted the transaction with fraud, and the mortgagees cannot derive any benefit from the mortgage, prejudicial to the creditors of the mortgagor.

It appears from this record that the debts assumed by Henry were bona fide debts of Samuel. It does not appear that the property in value exceeded the amount owing Henry,

2. FRAUDULENT CONVEYANCES: adequate con- sideration: ef- fect when fraud shown.	and the debts assumed by him. The consid- eration paid for the property, therefore, was not inadequate. This, however, is not con- trolling; for, even though the consideration
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paid was the fair value of the property, yet if the conveyance was made by Samuel with the purpose and intent of hindering and delaying his creditors, and was taken by his father with knowledge of this fact, and for the purpose of aiding Samuel in carrying out his fraudulent intent, the sale is void as against creditors, and this would be true even though it appear that Samuel was indebted to Henry at the time, and that part of the consideration was the payment of this obligation. The consideration may be sufficient, yet the transaction so tainted with a fraudulent purpose that it cannot stand, notwithstanding the consideration was fair and adequate. The fact of a fair consideration paid is evidence tending to negative a fraudulent purpose, but it is not conclusive on that point. Inadequacy of consideration is not always a ground for voiding a sale or conveyance made by a debtor. It is a circumstance to be considered in determining whether it was made with a fraudulent intent. It is not enough, to defeat a sale by a debtor to his creditor, that the consideration was inadequate, nor is it enough to support a conveyance that the consideration was adequate. A mort-

gage or transfer of all a debtor's property, whether founded upon a valuable or adequate consideration or not, made by both parties with the intent to hinder, delay or defraud creditors, is void as to them. The sale to be sustained must be made in good faith. Inadequacy of consideration or full consideration paid is a fact to be considered in determining this ultimate question.

We find the rule laid down in 20 Cyc., at page 488, as follows: "When it appears that the parties to a transaction impugned for fraud were actuated by a motive which the statute denounces as fraudulent, to wit, to hinder, delay or defraud creditors, it is utterly immaterial how valuable a consideration may have passed from the grantee or transferee, for the conveyance is none the less void in law."

This, we take it, is the general rule. The mere fact that an insolvent debtor makes a disposition of his property to some bona fide creditors, omitting others, does not, in and of itself, render the sale fraudulent as to the omitted creditors. A debtor may prefer one creditor to another in making payment out of his property.

Intent involves the mental attitude of the parties to the transaction. It may be honest, or it may be dishonest. It may involve a bona fide purpose or a fraudulent purpose. The consequences that follow the act are not solely determinative of the intent that accompanied the act. To defeat a sale, the intent to hinder, delay, or defraud creditors must exist. The intent is an act or emotion of the mind, and is arrived at by a just deduction from all the facts and circumstances proven. Where the intent on the part of the vendor is shown, either by direct evidence or facts and circumstances, the intent gives color to the act, and, if fraudulent, will, as to him, make his act of no legal efficacy, and if shared in by the vendee, and the conveyance taken for the purpose of enabling the vendor to accomplish his fraudulent purpose, it is void, whether this be shown by direct evidence or facts

and circumstances, for the reason that fraud avoids all contracts and the law gives them no efficacy for any purpose.

We will not stop to analyze this testimony. It speaks for itself and shows that the purpose and intent, both of the father and the son, in making this bill of sale, was to avoid the collection of plaintiff's judgment. The thought dominant in their minds was that it would be cheaper to beat it on execution than to incur the expense of an appeal. It is apparent that both thought plaintiff's judgment unjust, and that they were justified in defeating the collection of it in any way.

We think there was no error in the court's action and the case is, therefore,—*Affirmed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

TOWN OF HEDRICK, Appellee, v. FRED LANZ, Appellant.

MUNICIPAL CORPORATIONS: Ordinance—Validity—Contravening Policy of State. A municipality is but a creature of the state, with powers always subservient to the powers and policy of the state. It has no power to forbid or punish that which state law or state policy expressly or impliedly permits.

PRINCIPLE APPLIED: For many years, the policy of the state, as reflected in Sec. 1571, Sup. Code, 1913, was to prohibit and punish the act of running traction engines over bridges, culverts and crossings without planking; that is, unless planks of certain dimensions were placed under the wheels. Ch. 102, Acts 33 G. A., repealed this section by providing that until November 1, 1910, no such engine should be run over any such bridge, culvert or crossing without planking the same. *Held*, this repeal determined the policy of the state in this particular; was, in effect, a declaration that after said date engines might be run over crossings without planking the same; and an ordinance of a town requiring such planking after said date was null and void.

Appeal from Keokuk District Court.—HON. JOHN F. TALBOTT, Judge.

MONDAY, MAY 17, 1915.

THIS is an appeal from a judgment of conviction based upon a violation of a city ordinance prohibiting the driving of traction engines over street crossings without planking the same.—*Reversed.*

E. G. Moon and *D. W. Hamilton*, for defendant and appellant.

Stockman & Baker, for appellee.

1. MUNICIPAL CORPORATION'S :
ordinance :
validity : con-
travening pol-
icy of state.
- GAYNOR, J.—The defendant was arrested for a violation of an ordinance in the city of Hedrick, tried and convicted, and from the judgment of conviction, appeals to this court.

In the information upon which he was convicted, it is alleged that on the 20th day of June, 1913, he wilfully and unlawfully drove a traction engine over, upon, and across a certain street crossing, without placing, and keeping continuously placed, a plank or planks under the wheels of said traction engine while driving the same over the crossing.

The ordinance under which he was convicted provides:

“It shall be unlawful for any person or persons owning or operating a traction engine within the town limits of the incorporated town of Hedrick, Iowa, to cross any bridge, culvert, street crossing, or alley crossing, with such engine unless sound, strong planks, not less than one foot wide and two inches thick, be placed and kept continuously under the wheels of such engine while crossing such bridge, culvert, street or alley crossing; and no traction engine having mud lugs or ice spurs attached to its wheels shall be moved over any bridge, street, or alley crossing within the limits of the said incorporated town.”

The trial was had upon an agreed statement of facts, as follows: That on the 20th day of June, 1913, the defend-

ant drove a traction engine over, upon and across a certain street crossing on the main street, within the corporate limits of the town of Hedrick, without continuously planking under the wheels of said engine while driving the same over the crossing; that there were no lugs or spurs attached to the wheels of the engine; that the wheels were shod with common traction engine cleats; that the walk over which the defendant passed was not damaged; that the weight of the engine was 15,400 pounds.

A jury was waived and the cause tried to the court. At the conclusion of the evidence, the defendant moved to be discharged for the following reasons:

1. That but for the ordinance, defendant has committed no offense.

2. That the passage of the ordinance was beyond the power of the city.

3. That the ordinance is contrary to and in violation of the state law.

4. That the ordinance seeks to prohibit that which the law of the state permits.

This motion was overruled, defendant convicted, and he appeals.

It will be conceded that, but for this ordinance, defendant committed no offense; that the state law does not prohibit the act committed.

The first question is, was the passage of this ordinance a valid exercise of delegated power?

Second, if, under the general power delegated to cities, it had the right, was the exercise of this right in contravention of the policy of the state as expressed in Chapter 102 of the Acts of the 33d General Assembly?

Sec. 1571 was in force at the time of the passage of Chapter 102 of the Acts of the 33d General Assembly, and, so far as this case is concerned, reads as follows:

“In crossing any bridge or culvert in the public road,

or plank street crossing in any city or town, four strong planks not less than twelve feet long, each one foot wide and two inches thick, shall be used, by placing and keeping continuously two of them under the wheels."

A violation of this statute was a misdemeanor.

Chapter 102 of the Acts of the 33d General Assembly by its terms repeals Sec. 1571 above set out.

Sec. 2 thereof provides: "Until the 1st day of November, 1910, no traction engine shall cross any bridge, crossing or culvert in the public highway or street, unless sound, strong planks not less than one foot wide and two inches thick be placed and kept continuously under the wheels. No traction engine having mud lugs or ice spurs attached to its wheels shall be moved over any bridge, culvert, or street crossing."

It is apparent from the reading of Sec. 2, above quoted, that it was the ~~purpose and intent~~ of the legislature not to require the use of planks, either as provided in Sec. 1571 or as provided in Sec. 2 of Chapter 102 of the Acts of the 33d General Assembly, after November 1, 1910.

After the 1st of November, 1910, therefore, the state law did not require placing of planks under the wheels of traction engines when crossing over bridges, culverts and street crossings, except such traction engines as were encumbered with mud lugs or ice spurs.

Sec. 1571 of the Code Supplement of 1907 was a statute suggested by conditions. These heavy engines, passing over bridges or culverts on public roads and plank street crossings in cities, were found to have broken, destroyed or injured bridges, culverts, and plank street crossings. The inhibition did not extend to the use of the streets and highways generally. The regulation related only to a time and place in which they were crossing bridges, culverts, or plank street

crossings. Then it was that these heavy planks were required to be placed under the wheels.

As the use of traction engines in the country became more general, it was found that this provision requiring the use of planks at these particular points necessitated the carrying of planks with the engines, a very cumbersome and inconvenient thing to do, although the use of them was only required at these particular points. Then it was, we presume, that the legislature, observing the burden that this law cast upon the owners and drivers of traction engines, concluded that it would be better to require the public authorities to so construct their bridges, culverts, and street crossings that these engines might pass over them without the use of planks, and hence passed Chapter 102 above. But apprehending that the condition was not ripe for the use of these engines without these planks over these particular portions of the road, it gave the municipalities until the 1st of November, 1910, to so prepare the bridges, culverts, and crossings that the engines might pass in safety over them, without the use of the planks. Hence the legislature said, "Until the 1st of November, 1910, the traction engines shall not be permitted to cross without the planks."

After the 1st of November, it inferentially or impliedly said that this requirement on public roads would be dispensed with, except where the engine was encumbered with mud lugs or ice spurs attached to the wheels.

When the legislature said, the prohibition shall extend to the 1st of November, 1910, it impliedly said to the public, the inhibition shall not be enforced after November 1, 1910; that thereafter traction engines, unencumbered with mud lugs or ice spurs, shall have the freedom of the public highways the same as other vehicles, both in public highways of the cities and outside the cities as well.

It is common knowledge that all public highways are under the control of the state; that all power of lesser municipalities over such streets is simply a delegated power from

the state, whether exercised by a county, a city, or a town. It follows, therefore, that no municipality has power to make any law affecting public highways or their use which contravenes the policy of the state touching such control and use. Streets are for the public use, but do not exist for the use of the municipality in which they are situated alone, or its inhabitants. The municipality in which a public highway is located is vested with the supervision and control of such highways for public use. The supervision and control to be exercised over them is subject to the control of the legislature of the state from which such power is derived.

A municipal corporation can exercise only such power as is conferred upon it, and such as is incidental to the exercise of its governmental function, and then in the manner only prescribed by the statute. It cannot, by any legislation of its own, make that use of the highways unlawful which, by the statute of the state, is lawful; that is, where the state by its statute when fairly construed gives to the public a certain right in the use of the streets generally, and undertakes only to regulate or limit the exercise of the right, the municipality cannot, by its own act, prohibit or regulate the exercise of the right which is directly or inferentially granted to the citizen by the state without limitation, or such limitation fixed by statute.

The power to regulate the use of public highways so as to reserve for all the rights of all must not be exercised in contravention of the laws of the state touching the same matter.

The legislature of the State, in repealing Sec. 1571 and in enacting Chapter 102 of the 33d General Assembly, evidently made a balancing between the inconvenience to the public in requiring the carrying of these heavy planks when driving traction engines, and the injuries incident to the use of the public highways without planks, and reached the conclusion that a more reasonable and salutary regulation would be to require these municipalities to prepare their cross-

ings, bridges, and culverts so that engines could pass without the use of these planks. That is, that it was more reasonable and just to require the municipalities to prepare the public highway for the passage of these traction engines without planks than it was to require the driver of the traction engine to transport these planks from point to point, adjust them, and use them at crossings, culverts, and bridges.

The intent and purpose of the legislature in repealing Sec. 1571 and in enacting Chapter 102 of the Acts of the 33d General Assembly is made manifest by its section in continuing inhibition until the 1st of November, 1910, and then limiting inhibition only to traction engines encumbered with mud lugs and ice spurs. These encumbrances on which the inhibition rests may be removed from the engine, and then the inhibition does not attach.

It is true that, under Sec. 753 of the Code, cities and towns have the care, supervision, and control of public highways, streets, avenues, alleys, public squares, and commons, within their limits, and that it is their duty to keep the same open and in repair and free from nuisance.

It is true that Sec. 695 gives to towns the power to enact ordinances to protect its property.

It is true that, generally speaking, a municipal corporation has absolute control of its streets and may enact such ordinances, not inconsistent with the laws of the state governing their use, as shall be necessary in its judgment to protect the public. There are two limitations upon this right to enact ordinances: First, the ordinance must be reasonable and must be without undue discrimination, and second, it must not contravene the policy of the state expressed in its legislation. See *Lacy v. City of Oskaloosa*, 143 Iowa 704.

It is true that Sec. 680 grants to cities the power to make public ordinances for carrying into effect or discharging the powers and duties conferred upon them, and such as seem necessary and proper to provide for the safety and to preserve the health, etc. of such corporations. But this sec-

tion limits the power to pass ordinances, in that it provides that the ordinances passed shall not be inconsistent with the laws of the state touching the same subject-matter.

It is true that all cities and towns may enact ordinances, even where the state has legislated upon the same subject, but even then, the ordinance must not be inconsistent with or contravene the policy of the state as expressed in its legislation. See *Town of Neola v. Reichart*, 131 Iowa 492; *Town of Bloomfield v. Trimble*, 54 Iowa 399; *Town of Sibley v. Lastrico*, 122 Iowa 211; *Town of Avoca v. Heller*, 129 Iowa 227.

It does not appear when this ordinance was passed, but we assume from the wording of the ordinance that it was adopted after the passage of Chapter 102 of the Acts of the 33d General Assembly.

For the reasons hereinbefore stated, we think that the ordinance in question was void as contravening the policy of the state touching the use of traction engines upon public highways, and that the motion of the defendant, at the conclusion of the testimony, should have been sustained. The cause is, therefore,—*Reversed*.

DEEMER, C. J., LADD and SALINGER, JJ., concur.

BUILDERS LIME & CEMENT COMPANY, Appellee, v. A. W.
WEIMER, Appellant.

ALTERATION OF INSTRUMENTS: Bills and Notes—Materiality—

- 1 "Or Bearer" for "Or Order"—Effect. The fraudulent substitution in a negotiable promissory note of the words "or bearer" for the words "or order" constitutes a material alteration. (Sec. 3060-a125, Sup. Code, 1913.)

BILLS AND NOTES: "Holder in Due Course"—Original

- 2 Holder. The original payee or bearer of a negotiable promissory note, in possession thereof, is a "holder." (Sec. 3060-a191, Sup. Code, 1913.) It requires one more step or transfer to create a "holder in due course," viz., a transfer by this payee or bearer

to one who, when he takes it, has no notice of any infirmity therein. (Sec. 3060-a52, Sup. Code, 1913.) In other words, a "holder *in due course*" is one to whom, *after* completion and delivery, the instrument has been again delivered. To phrase it again, the term "holder in due course" is applicable only to one who takes the instrument by negotiation from another person who is a holder. (See Sec. 3060-a30, Sup. Code, 1913.)

PRINCIPLE APPLIED: The note in question was: "Six months after date we promise to pay to the order of Mueller Lumber Co. \$2,500.00 at Davenport, Iowa, with 6 per cent interest. (Signed) Concrete Construction Co.

Wm. Weimer,
H. E. Brown,
A. W. Weimer.

The lumber company refused to receive the note. Thereafter, an officer of the Concrete Construction Co., without the knowledge of A. W. Weimer (the defendant), drew a pen line through the words "order of" and after payee's name inserted the words, "or bearer," and delivered the note to the Builders Lime & Cement Co. in part payment of a debt due from the Concrete Company to the Cement Company, said latter company, on receipt of the note, surrendering security held by it and knowing nothing about the fraudulent change. *Held*, the latter holder was not a "holder in due course."

BILLS AND NOTES: Negotiation of Note—Liquidation—Reissue by

3 **Maker—Position of Last Transferee.** One who receives a promissory note *from the maker* in part payment of a debt due from the maker cannot establish that he is a "holder *in due course*" by showing that said note had, prior to the time he received it, been held by other "holders in due course." When the note found its way back into the hands of the maker, such former holdings "in due course" lost their former force and effect, even though the maker did reissue the note.

Appeal from Scott District Court.—HON. M. F. DONEGAN,
Judge.

THURSDAY, FEBRUARY 18, 1915.

REHEARING DENIED TUESDAY, MAY 18, 1915.

THIS action is on a note in words following:

"\$2,500.00.

Feb. 1, 1907.

Six months after date we promise to pay to the order of

Mueller Lumber Company or bearer Twenty-five hundred & no-100 Dollars at Iowa National Bank of Davenport, Iowa.

Value received with interest at the rate of 6% per annum.

CONCRETE CONSTRUCTION COMPANY,

By Cecil E. Bryan, President.

Wm. Weimer,

Harry E. Brown,

A. W. Weimer.

No. ————— Due —————

(On back) Concrete Const. Co.

By Cecil E. Bryan, Pres.

Cecil E. Bryan,

J. S. Wilbert.

The defendant Weimer, answering, alleged that he signed his name as surety following Wm. Weimer and Brown, to enable the Concrete Construction Company to purchase lumber of the payee to enable it to complete certain contracts; that the payee refused to take the note; and that thereafter the Concrete Construction Company fraudulently obliterated the words "order of" in said note and inserted, after the words "Mueller Lumber Company," the words "or bearer" in said note, and for this reason he is not liable thereon. For reply, plaintiff alleged that said Weimer was a joint maker, denied any alteration and averred, if any there was, it was made by defendants or their agent and was without the knowledge of plaintiff, and the cause was submitted on findings of fact made by the trial court as follows:

1. That the note sued on, plaintiff's Exhibit "A," was signed by the defendant, A. W. Weimer, on the face thereof.

2. That at the time the defendant signed said note it read payable "to the order of Mueller Lumber Company."

3. That after said note had been signed by the defendant, A. W. Weimer, it was left in the possession of the Concrete Construction Co., by being left in the possession of Cecil E. Bryan, President of said Company.

4. That after said note had been signed by the defendant, A. W. Weimer, and left in the possession of said Cecil E. Bryan, the words "order of" were stricken out by being crossed out in ink and the words "or bearer" were inserted on the face of said note immediately after the words "Mueller Lumber Company."

5. That the said change in said note was made by said Cecil E. Bryan and without the knowledge or consent of the said defendant, A. W. Weimer.

6. That after said change had been made in said note it was endorsed on the back thereof as follows:

"Concrete Const. Co.
By Cecil E. Bryan, Pres.
Cecil E. Bryan,
J. Wilbert."

7. That after said note had been changed and endorsed as set out in findings four and six above, and before maturity, it was delivered to and accepted by the plaintiff, Builders Lime & Cement Co., in part payment of an indebtedness owing to said plaintiff by the Concrete Construction Co., for material furnished.

8. That at the time said note was delivered to and accepted by plaintiff, said plaintiff released and delivered to said Concrete Construction Company an order for \$2,000.00, which said company had previously given plaintiff upon the principal contractor of the Hotel Davenport building.

9. That at the time said note was delivered to and accepted by plaintiff, said plaintiff had no knowledge nor information that said note had been changed in any manner after being signed by the defendant, A. W. Weimer, or the other signers on the face thereof.

As conclusions of law, the court found the alteration material, that plaintiff was holder in due course and entitled to enforce payment according to the original tenor of the

note. Judgment was entered accordingly. Defendant A. W. Weimer appeals.—*Reversed*.

Cook & Balluff, for appellant.

J. A. Hanley and Lane & Waterman, for appellee.

LADD, J.—The note, when signed by defendant, Weimer, he being the last to sign, was payable to the order of the Mueller Lumber Company, and thereafter was changed by erasing “order of” therein and inserting after the name of the payee the words “or bearer.” This was done without defendant’s consent before its delivery, by Bryan, president of the Concrete Construction Company, the first signer; and the latter, Bryan and Wilbert, endorsed the same and thereafter the note was delivered to the plaintiff for a valuable consideration and accepted without knowledge of the alteration. Any fraudulent alteration which has the effect of changing the negotiability of the instrument altered is material and avoids the instrument. Sec. 3060-a125 Code Sup. Thus the fraudulent addition of the words “or order” or “or bearer” after the name of the payee or the substitution of one of these phrases for the other is material and vitiates the bill or note in which this is done. *Needles v. Shaffer*, 60 Iowa 65; *Croswell v. Labree*, 81 Me. 44, 10 Am. St. 238; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. R. 68; *Walton Plow Co. v. Campbell*, 35 Nebr. 173, 16 L. R. A. 468; *Booth v. Powers*, 56 N. Y. 22; *Haines v. Dennett*, 11 N. H. 180. Contra see *Weaver v. Bromley*, 65 Mich. 212, 31 N. W. 839.

Such is the law with relation to alterations of a promissory note after delivery, and the rule is the same with respect to such alterations before delivery when made by the principal or payee without the consent of the surety or sureties signing accommodation paper, in so far as these affect the rights of sureties. *Bell v. Mahin*, 69 Iowa 408; *Draper v.*

1. ALTERATION OF INSTRUMENTS: bills and notes: materiality: “or bearer” for “or order”: effect.

Wood, 112 Mass. 315, 17 Am. R. 92; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. R. 372; 2 Daniel on Negotiable Insts., Sec. 1373a.

They may insist on being held only on the strict terms of the contract. But there is not enough in the record before us to warrant the conclusion that Weimer signed as surety. The circumstance that the consideration passed to the Concrete Construction Company did not necessarily render him such or prove that he was so liable. He must then be treated as one of the makers. If, as such, he entrusted the note with a co-maker and the latter altered the instrument before delivery and it has passed into the hands of a holder in due course, the latter takes it freed from the infirmity, on the theory that whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Manifestly, this doctrine does not apply to the original parties to the instrument, for then in that situation the minds of the parties can never be said to have met; for the payee or person receiving the instrument has taken it in its altered condition, the terms of which the complaining maker never agreed

2. **BILLS AND
NOTES:**
"holder in
due course":
original
holder.

upon or subscribed to. The controlling issue for our determination then is whether plaintiff is a holder in due course. It did not acquire the note from the payee Mueller Lumber Co. either by endorsement or delivery or from anyone to whom that company had passed the instrument. The findings were that "it was delivered to and accepted by the plaintiff, Builders Lime & Cement Co., in part payment of an indebtedness owing to the plaintiff by the Concrete Construction Co. for material furnished" it, and "at the time said note was delivered to and accepted by plaintiff said plaintiff released to said Concrete Construction Company an order for \$2,000 which said company had previously given plaintiff upon the principal contractor of the Hotel Davenport building." Another finding of the court was that after the note had been

signed by Weimer, "it was left in the possession of the Concrete Construction Co. by being left in the possession of Cecil E. Bryan, President of said Company." These findings are not questioned, and as the evidence was not abstracted, but one conclusion was to be inferred therefrom, and that is that the note, after the alterations and with the endorsements, was delivered by the first maker, the Concrete Construction Company, to the plaintiff. The endorsement by it as maker added nothing to its obligations and, of course, did not change its relation to the instrument from one of the makers to a holder. Nor, in view of the delivery of the note by the first maker to plaintiff, is it to be inferred that Bryan or Wilbert, whose names appear on the back of the notes, had been holders thereof; but even if one or both had been, it had come back to the maker, and giving it to the plaintiff was a re-issue and the same as though it were delivered for the first time. *Wilkinson v. Daniels*, 1 G. Greene, 179.

There is no escape from the conclusion that the note first passed from the Concrete Construction Company, one of the makers, to plaintiff, and that the latter never was a holder in due course. A "holder means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Sec. 3060-a191, Code Sup. Something more is essential to constitute him a "holder in due course." The instrument must have been negotiated by a holder as above defined, in order to constitute the taker a holder in due course. This is recognized in Paragraph 4 of Sec. 3060-a52, Code Sup., defining a holder in due course and exacting "that at the time it was negotiated to him (holder) he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Sec. 3060-a30 of the Code Supplement declares that: "An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated

by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery."

The point was settled in *Van der Ploeg v. Van Zuuk*, 135 Iowa 350, where the court, speaking through McClain, J., said: "The latter term (holder in due course) seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In the ordinary case, the payee of the instrument is the person with whom the contract is made, and his rights are not in general dependent on any peculiarities in the law of negotiable instruments. . . . In other words, we think that 'holder in due course' should be construed as applicable only to one who takes the instrument by negotiation from another who is a holder." The note had not been delivered when in the hands of the first makers, and the transfer of it to the plaintiff did not constitute the latter a holder in due course.

3. **BILLS AND NOTES:** negotiation of note: invalidation: re-issue by maker: position of last transferee.

Even if Bryan or Wilbert might at one time have held the note, the Concrete Lumber Company had again acquired it and plaintiff could be in no better position on a re-issue than were it first delivered to it. The court erred in finding plaintiff a holder in due course and the defendant might interpose any defense open to him as against a party to the instrument. It was not endorsed over by the payee or delivered to plaintiff by it, and plaintiff acquired such title as it had only through the insertion of the word "bearer," to which this defendant had never assented. The instrument sued on he had never signed or agreed to and he was not bound thereby. The district court should have dismissed the petition.—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

A. H. CLARK, Appellee, v. CHICAGO GREAT WESTERN RAILROAD
COMPANY, Appellant.

MASTER AND SERVANT: Operating Train—Application of Brakes

- 1 —**Failure to Warn—Rules—Custom—Negligence.** Evidence and instructions briefly reviewed and held to present a jury question whether defendant was negligent in the manner in which the brakes were applied to a train, and whether warning of such application was required (a) by rule or (b) by custom.

**MASTER AND SERVANT: Federal Employers' Liability Act—In-
2 terstate Commerce—Use of Track—Submitting Question to Jury.**

The Federal Employers' Liability Act authorized an action thereunder only when both carrier and the employee are engaged in interstate commerce. *Held*, carrier was engaged in such commerce over the track in question, though such track was not fully completed.

PRINCIPLE APPLIED: Plaintiff's duty as trainmaster was to be out upon the road from Oelwein, Iowa, to Chicago, supervising matters in general. At the time of his injury, he was superintending the laying of gravel on the track. The track was newly constructed and not fully completed. It had not been bulletined for use, but on both of the two days preceding the injury, it had been used to store two interstate trains, at least one of which proceeded over the line. The track had been put to no other use except for work trains. *Held*, (a) the defendant was using the track for interstate commerce, and (b) it was not improper to permit the jury to say whether the laying of the gravel was being done in the maintenance of a roadbed used in interstate commerce or in the original construction of the track.

RELEASE: Mental Capacity—Evidence Reviewed—Master and Serv-

- 3 **ant.** Evidence reviewed and held to show that one who had signed a release was under no mental disability at the time of signing.

RELEASE: Consideration—Payment of Lost Wages—Re-Employ-

- 4 **ment.** A release of all claim for personal injury, in consideration of being re-employed and paid for lost time, is supported by a sufficient consideration.

Appeal from Dubuque District Court.—J. W. KINTZINGER,
Judge.

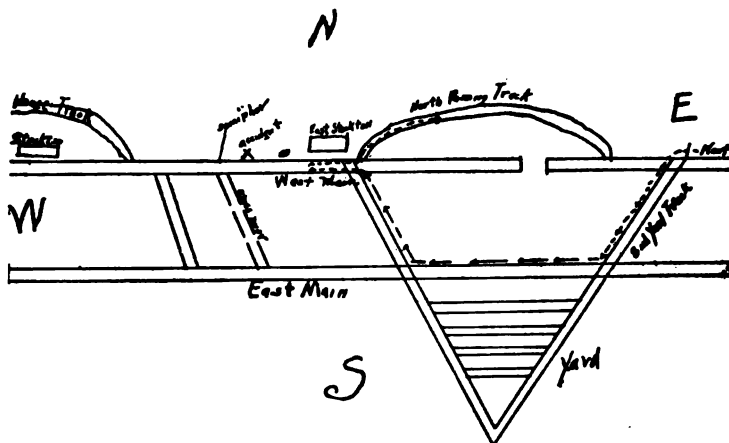
TUESDAY, MAY 18, 1915.

ACTION for damages resulted in verdict and judgment as prayed. Defendant appeals.—*Reversed*.

Carr, Carr & Evans and *Geo. T. Lyon*, for appellant.

Mathews & Chalmers and *Geo. A. Barnes*, for appellee.

LADD, J.—The injury complained of was received near Stockton, Illinois, and the petition claiming damages is in



two counts, the first declaring the defendant liable in consequence of the negligence of its engineer under the provisions of the Act of Congress, approved April 22, 1908, known as the Employers' Liability Act, and the second under the common law. The latter was withdrawn from the jury on the ground that "defendant company is not liable for injuries received by one of its employes through the negligence of his fellow servant in the state of Illinois."

The defendant's line of railway extends from Chicago through Byron, East Stockton and Stockton on to Dubuque and through Iowa. East Stockton is about one and one-half or two miles east of Stockton, and Kent is about the same dis-

tance east of East Stockton. The plat will indicate the construction of the line at and between these several places.

A train came from the east on the east main track to one of the cross-overs indicated on the plat, in order to reach the west main line, and this west main line is disconnected from the line immediately east of it.

On the 18th day of November, 1910, the train crew picked up a train of 25 or 26 cars of gravel at Byron, some 40 miles east of Stockton, and moved it westerly until reaching the west main line, and, cutting off the caboose, shoved the cars on a sidetrack. In the morning of the 19th, they took the engine and caboose from Stockton to East Stockton, and going to the yards got what is known as a plow car and seven cars of gravel, took them to the west main line, and, after going west, backed the same to a point near the semaphore and unloaded some of the cars on the track. The gravel fell from the "V" shaped bins to the middle of the track and the plow car coming behind leveled this off. On backing to unload at another place toward the east, with the plaintiff standing on the plow car near the sand box (a sand box three or four feet high was at each end), the conductor and possibly the brakeman gave the engineer a signal to "slow down." As the engineer applied the air to the brakes, the plow car jerked and threw plaintiff from the car across the rails below and he was seriously injured.

I. But two grounds of negligence were submitted to the jury: whether defendant was negligent (1) in the manner of applying the brakes in response to the slow down signal given by the conductor and brakeman, and

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(2) in failing to sound the whistle twice as a warning before applying the brakes. Appellant contends that the evidence was insufficient to support either. Though alleged as distinct grounds, the court in the seventeenth instruction said that "the only questions of negli-

gence, if any, submitted to your consideration are the allegations of defendant's negligence in carelessly and without warning causing the air to be applied on the engine so severely and suddenly that the speed of the engine and train was checked so suddenly and violently as to throw the plaintiff from the car on which he was riding"; and in the twenty-fourth instruction, the jury was directed that in order to return a verdict for the plaintiff it must find that defendant's employees checked the speed of the engine and train with unusual force and violence; or that under a rule of defendant or in accordance with the customary practice, the engineer upon receiving a signal to slow down when on the line, should respond before doing so with two short blasts of the engine whistle, and that he omitted so to do, and that because of such failure to give warning and the sudden and violent jerk of the train in slowing down, the plaintiff was thrown from the cars and injured.

In the twenty-fifth instruction, the jury was told that if such were not the rule or custom, or if the two blasts were sounded, or if there was no unusual and violent jerk the verdict should be for defendant. If such were the customary practice, then the plaintiff might have been found to have had the right to rely upon the signal before there would be any jerk from the service application of the brakes, and even though there may not have been sufficient evidence to show negligence in the manner of applying the air, the jury might well have concluded that, in so doing without warning, the defendant was negligent. True, a witness testified that there was no such rule, but as plaintiff had testified there was, this merely put the existence of such a rule in issue. One was introduced reading that "when a signal (except a fixed signal) is given to stop a train, it must be acknowledged as prescribed by Rule 14 (G)." Rule 14 required that two blasts shall "answer to any signal not otherwise provided for." What is meant by a "fixed signal" is nowhere explained, and, moreover, the existence of the printed rule did not obviate

a finding by the jury that a response in the manner stated to a slow-down signal was not the customary and usual practice when working out on the line. We are of the opinion that the issue as to defendant's negligence as submitted was for the jury.

II. The court instructed the jury that, as the injury was in consequence of the negligence, if any there was, of a fellow servant, recovery might not be had unless the plaintiff as

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well as the defendant was engaged in inter-
state commerce. Appellant contends that
there was no evidence that the track, when
the gravel was being placed, was being used
in interstate commerce. Plaintiff's duty as
trainmaster was "to be out on the road, keep-

ing things moving, keeping the trains moving, seeing that
the men were doing their work right and proper and anything
that might come up." He was then devoting most of his time
to the railway between Stockton and Byron in Illinois, on
account of the congestion of business there; but his employ-
ment extended from Oelwein, Iowa, to Chicago, Illinois, and
he was acting under the direction of the superintendent, as
his representative. Though the west bound track had not
been bulletined for use on November 17, 1910, a freight train
tied up on the east end of it and, as was testified: "They had
orders to tie up there under the sixteen-hour law, and they
had backed down and put their train in there on that track;
they used the middle cross-over to get in on the west main
track; used the one opposite the East Stockton depot; they
put their train on the east end of the west bound main line;
stayed there till the rest was up, about eight hours, and then
pulled out on the west bound track to Dubuque, I presume;
the destination of that train was Oelwein. A train also tied
up on the 18th at Stockton on the east end of the west bound
main on that part of the track east of the middle cross-over
at the East Stockton station." Thus this identical track had
been actually devoted to the purposes of interstate commerce

on two occasions immediately previous to the accident, and the evidence also disclosed that it had been made use of for no other purpose. As plaintiff was trainmaster and the representative of the superintendent in actual charge of the construction of the new track, it is to be inferred that he was authorized to determine when so far completed as to be ready for use and to direct the use to be made thereof, and he so did. He testified that the train crew had attached the engine to the cars of gravel and hauled them "up to where the semaphore used to be and unloaded part of the cars on the west bound main track. The engine was headed west. I was on the train when they left East Stockton for Stockton; rode up to the semaphore and stopped there. I should judge that semaphore was about one-third of the way from Stockton to East Stockton. When we got there we unloaded three or four cars to patch up the main line. It was my business to show them where to put the gravel. I don't know whether that line marked as 'west main line' between East Stockton and Stockton was bulletined for service or not, but it had been used; was used on the night of the 17th for the purpose of storing the train; the crew asked me where they should put their train,—they had orders to tie up at Stockton—and I told them where to put it because the other tracks were full of gravel; when the engine and six or seven cars and the plow car reached a point near the semaphore I got off the train, walked along and told them how much gravel to let out so it would not flood the rails; I walked along that way during all the time they were unloading. After we had unloaded all that was required at that point, I got on the train and started back for East Stockton, I got on my ladder at the east end of the plow car. The plow car is an ordinary flat car with sand boxes on each end of it over the trucks and the plow in the center, double plow pointed up to a point to throw the gravel off the track. There was a crank to raise and lower the plow; when the plow was working it laid right down on the track and the shoe of the plow scooped off a space of six inches

inside about an inch and a half below the ball of the rail. When it was not in operation there were two to four inches from the bottom of the plow to the top of the rail. We had been distributing considerable gravel in the new yards that day that is where the gravel was needed."

Other evidence of similar character was adduced. The defendant was engaged in interstate commerce over this line of railway; it had used this particular track on which to store at least two trains actually bound from points in Illinois to Oelwein, Iowa; the construction had been sufficiently completed for that purpose and what was being done might well have been found to be merely leveling the grade and filling up depressions therein for continued use in interstate commerce. Certainly the jury might have so found under the evidence, rather than that what was being done was a part of the original construction of the roadbed disconnected from its use; and if so, there was no error in submitting to the jury whether what was done was in the maintenance of the roadbed being used in interstate commerce or in the original construction of the same. If the former, then plaintiff was engaged in interstate commerce at the time of being injured and must recover, if at all, by virtue of the so-called Employers' Liability Act of Congress. *Pederson v. Ry.*, 229 U. S. 146.

III. The defendant pleaded the execution of a release dated February 2, 1911, from "all claims, damages, actions, causes of action or suits at law for or because of any matter or thing done, omitted or suffered to be done by said company, its agents or servants" up to the date of the release. In reply, the plaintiff alleged, first, that the release was procured by fraud in that Dr. Davis, the defendant's surgeon, represented to plaintiff that nothing ailed him except a difficulty with his nerves, and recommended that he resume employment with defendant and mingle with his former associates and that this would likely cure him; that he so did in reliance upon said physician's recommendation and

3. RELEASE:
mental capacity:
evidence reviewed:
master and servant.

signed said release in reliance thereon; that the statements of the said physician were false, known to be false by him and made with the intention of inducing him to execute the release mentioned.

In addition to this, the plaintiff alleged that he was incapable at the time of signing the release to execute a valid contract. The trial court declined to submit the issue of fraud raised by the reply, and as plaintiff has not appealed, we have no occasion to pass on that ruling, (see however *Haigh v. White Way Laundry Co.*, 50 L. R. A. (N. S.) 1091, and cases collected in note); but did submit the question as to whether the plaintiff was capable of and did appreciate the conditions of the release. Appellant contends that the evidence is insufficient to show that the plaintiff was unable to comprehend what he did at the time of executing the release. The plaintiff testified:

"I have heard of the rule that employees are required to sign releases before they return to work; I knew there was such a rule. In a general sense I knew what a release was. Dr. Davis told me at the time Mrs. Clark was with me that there was nothing the matter with me but the nerves and in order to get well, I must go back among the men, get back among my old associates and forget it, told me the only way I would improve would be to get among the men and forget it, get it off my mind. I told Mr. Causey what Davis had told me when I went to report for work, told him the doctor said I would get well faster if I went to work. Mr. Causey told me I would have to sign a release. I don't know as I said, 'I know it,' but I might have said I suppose so, or something of that kind. I knew the nature of the paper I would have to sign was termed a release. I cannot say that Mr. Causey told me anything I didn't already know, when he told me I would have to sign a release. Then he said he would pay me for time lost, and I responded 'very well' or words to that effect. That is all the conversation I had with

him. There was no talk about any payment in the future; the only thing I remember was speaking about my eyesight and hearing and he told me that wouldn't be held against my physical examination. So far as my receiving any more pay if I didn't get well as the doctor thought I would, there was nothing said, either by me or by Mr. Causey about receiving any additional compensation. . . . There was no indication to me that if I did not get well I would be entitled to any more. According to the doctor's report to me, there was nothing to get well only the nerves; I felt some pain and felt I had not been improving as fast as I should; I did not feel I was already well, knew I was not well when I went to talk to Mr. Causey. The doctor told me it was the only way I would get well; I knew I was not well at the time. . . . I did not read the release when I signed it, did not pay much attention to it, I knew I had to sign it, so I just signed it without looking at it. The instrument, defendant's 'Exhibit A,' is the release I signed in the superintendent's office, that is my signature. I could read at the time I signed that release. I think I stood up and signed it on a table; it was handed to me by Mr. Johnson's clerk. . . . I talked over with Mrs. Clark the matter of going back to work and if I remember right, she did not want me to go to work; we often talked over the advisability of taking Dr. Davis' advice and returning to work; as I remember she protested against it, protested against my signing anything; told me, after the conversation with Dr. Davis in which he referred to signing up, not to sign anything, and protested against me doing it. She asked me when I went to work, not to go, regardless of what the doctor said. The day I reported she requested me not to; she warned me not to sign anything."

The superintendent and the clerk present testified that they noticed nothing out of the way with plaintiff at the time of signing the release. That Davis had prescribed certain pills for him to take in order to relieve him from pain

is not disputed, but there is no evidence that the effect of these pills was to impair his intellect, and we have been unable to discover any testimony which tended to indicate that he was mentally incapable. Undoubtedly he had suffered severe pain and his wife had insisted that he should not sign a release, but this with his testimony falls far short of establishing inability on his part to comprehend what he was doing. See *Owens v. Norwood Coal Co.*, 157 Iowa 389; *Oakes v. Ry.*, 157 Iowa 15; *Nason v. Ry.*, 149 Iowa 608.

The defendant, on receipt of the release, paid plaintiff for the time since being injured at the same rate of compensation as before, and employed him as conductor, when, but for the execution of the release, it would not have done so. Such payment and employment, contrary to appellee's contention, constituted a sufficient consideration for said release. It follows that the court erred in submitting to the jury the issue as to plaintiff's mental capacity to execute the release, and because of this error the judgment is—*Reversed*.

4. **RELEASE:**
consideration:
payment of
lost wages:
re-employment.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

FRANKLIN BENJAMIN, Appellee, v. PETERSEN HEAT, LIGHT & POWER COMPANY et al., Appellants.

ACTION: Improper Joinder—Waiver. The improper joinder of actions furnishes no ground for complaint when no objections are made thereto in the lower court. (Sec. 3548, Code, 1897.)

MORTGAGES: Foreclosure—Real Party in Interest—Pledgor. The pledgor of a promissory note secured by mortgage may maintain foreclosure proceeding.

EVIDENCE: Exclusion—Immaterial Issue. The exclusion of evidence as to who employed the attorney of record for plaintiff was not error, when the object sought was to show that plaintiff had pledged the note sued upon, such act of pledging being no defense to the action.

CONTINUANCE: Discretion of Court—Opportunity to Prove Immaterial Issue. It is not error to deny a motion for a continuance in order to prove an immaterial matter; for instance, to enable defendant, in a mortgage foreclosure, to prove that the plaintiff was only the equitable owner of the note.

Appeal from Hardin District Court.—HON. R. M. WRIGHT, Judge.

FRIDAY, JUNE 18, 1915.

ACTION in equity to foreclose a mortgage. Decree for plaintiff. Defendants appeal.—*Affirmed.*

E. H. Lundy and Dean W. Peisen, for appellants.

Williams & Huff and W. B. Wilson, for appellee.

Per Curiam.—We cull from the record the following statement which we think fairly states the case. The Iowa Falls Electric Light & Power Company, while the owners of an electric light plant at Iowa Falls, executed three mortgages. The second, securing notes aggregating some \$14,000.00, was owned by the plaintiff. Default was made and this action commenced to foreclose.

The contentions of the defendant are, substantially, that in 1910, a former bill was filed to foreclose the same mortgages, which proceeded until April 7, 1910, when formal decree of foreclosure was rendered; that is, a draft of a decree was signed by the judge. At the same date, a contract was made between plaintiff and O. F. Petersen, providing, among other things, that the decree signed by the judge should be deposited with one Harris in escrow pending the carrying out of the other provisions of the contract. That contract was, in substance, an effort on the part of plaintiff and the defendant, Petersen, to fund all the indebtedness of the defendant company by issuing bonds secured by a mortgage for \$50,000.00 on the company's plant; that Petersen should deliver these bonds to plaintiff; that the bonds were

to be issued to pay off the three mortgages on the plant, and Petersen was to retain \$7,000.00 of them for himself; that Petersen should forward to plaintiff a complete statement of the condition of the plant, and an abstract, and pay Benjamin \$250.00. Plaintiff was then to look after lithographing the bonds and send them to Petersen, who was to execute them and file with Harris in escrow. When Benjamin delivered up the notes in satisfaction of the two mortgages, the bonds were to be turned over to him. There is no undertaking by Benjamin that he will do these things, but merely a provision that if he does secure the releases of the three mortgages he is to be given the \$50,000.00 of bonds, less \$7,000.00 retained by Petersen. The bonds were never issued and nothing was done under the contract. It is conceded by appellee that if the bonds had been issued and plaintiff had received them in satisfaction, that would have been a defense. The effort to clean up the whole debt by issuing the bonds failed, as plaintiff claims, and the court found, because the franchises for the use of the streets expired in about two years, whereas Petersen represented to plaintiff that they ran for twenty years; and no bonds maturing in twenty years could be placed on a franchise expiring in two years. At any rate, as stated, the bonds that were to be issued to pay the notes secured by this mortgage were not issued.

In a further effort to adjust these matters, an arrangement was made between Benjamin and Petersen looking toward a trade for some Oregon land. The third mortgage on the light plant was owned or represented by one Hill. It was also additionally secured by a lien of some character on some kind of plant at Marshalltown. As before indicated, the contemplated settlement between Benjamin and Petersen, which was not consummated, provided for some bonds to be retained by Petersen. The third mortgage was of small value, and it was doubtless hoped that it could be provided for for a nominal consideration. Petersen had already

claimed the title to some land in Oregon. It seems the Oregon land was subject to a mortgage which had been foreclosed, a sale had been had under the decree and all but four days of the time for redemption had expired. While matters were in this condition, with negotiations pending for an exchange to Petersen of the indebtedness secured by the third mortgage, before referred to, and also by the Marshalltown property for the Oregon equity, Petersen gave Benjamin what purported to be an abstract of title and a lease of the Oregon land, together with a deed, in which no grantee was named. The answer alleges that said deed and abstract were accepted as a settlement in full of all the claims of the plaintiff against each and all of the defendants. We think the evidence does not show any such agreement, and the paper executed between the two does not show this. The whole matter was not completed. The memorandum or receipt just referred to provides that:

“If I can get a satisfactory settlement, satisfactory to me of the encumbrances on said farm, that the deal on the Iowa Falls plant goes through, as per our previous arrangement; if not the papers should be returned.”

It is conceded by appellee that the papers should probably have been returned, as the deal was not completed, but is contended that the fact that an abstract of title of the Oregon land, with the blank deed, had been left with plaintiff, does not pay the mortgage.

These are the only defenses set up in the pleadings. They are not now seriously relied upon by appellant. We say this because these matters are not covered by the assignments of error which have been made. Upon the trial, the facts were found against appellants, and reliance is now placed by appellants upon matters more or less technical.

It should have been stated that, in addition to the foreclosure of the mortgage, a judgment was rendered against

O. F. Petersen on the note for \$1,000.00, and of this, complaint is made on the ground that the authority of a managing agent to sign negotiable paper must be shown. But it appears that the note was made by the manager of the business, and the testimony of the manager is that he reported the execution of this note to Petersen, and it was contended for appellee that if there was any question of the authority of the agent to make the note it must have been raised promptly, and the failure to make any objection is a ratification, and, further, that the authority of a general manager of a commercial business does, *prima facie*, extend to the making of a promissory note for his principal. We think the only question there could be as to the propriety of the judgment against Petersen on this note is whether the one suit to foreclose the mortgage, and in the same action to recover judgment on the note, might not be regarded as multifarious. But no objection was made thereto, and it is waived. Code, Secs. 3547, 3548. The objection is first made on appeal.

2. It is objected that the suit cannot be maintained in the name of the plaintiff because, at the time the bill was filed, the plaintiff had pledged the notes and mortgages in suit to one Lamb. But it has been held that while, upon a pledge of negotiable or other securities, the technical legal title may pass so as to enable the pledgee to maintain a suit at law in his own name, the assignor or pledgor, the original owner, remains the owner in equity, subject to a lien in favor of the pledgee, and may maintain a suit in equity as such owner. *Gilman v. Heitman*, 137 Iowa 336.

3. It is contended by appellants that the witness Wilson should have been required to testify as to his appearance and employment in the case. Witness was also an attorney of record for plaintiff and declined to answer some of the questions propounded to him because they were privileged as between himself and his client. We think he did answer as to his appearance

1. ACTION:
improper
joinder:
waiver.

2. MORTGAGES:
foreclosure:
real party in
interest:
pledgor.

3. EVIDENCE:
exclusion: im-
material issue.

and employment. The record shows, among other questions asked:

Q. "Did Mr. Benjamin employ you, I will put it that way, to appear here in this case?"

Court: "You may answer that question."

A. "Mr. Benjamin requested me and authorized me to appear for him." Q. "Did he employ you to do so?" A. "That is a legal conclusion I should say; Mr. Benjamin has not paid and I think I can properly say he has not promised in word to pay me any money for my services." Q. "So you have neither an oral promise nor a written promise from Mr. Benjamin to pay you for your services in this case?" A. "Unless it may be implied from the fact that I am rendering services with Mr. Benjamin's knowledge and approval."

A number of questions were asked along this line. As to those questions wherein the witness was excused from answering, we think they related to confidential and privileged communications. Furthermore, the question as to who, if anyone, employed Mr. Wilson, was not a fact that tended to sustain any issue tendered by the defendant. The only bearing this could have would be upon the claim of appellants that at the time of the trial another person had become the legal owner of the notes and mortgages in suit. The only matter of importance from appellants' standpoint would be to show that Mr. Wilson was not employed by plaintiff. There was other evidence in the case to the effect that plaintiff was not employing Wilson. But, for the reasons given in the prior division of the opinion, we think this is immaterial.

4. CONTINUANCE: discretion of court: opportunity to prove immaterial issue. For the same reason, there was no abuse of discretion of the trial court in overruling defendants' motion for a continuance. The continuance was asked in order that defendants might show that the notes and mortgage had been pledged and that the legal title was in another.

Our conclusion is that the appeal is without merit, and the judgment and decree of the district court is—*Affirmed*.

DEEMER, C. J., EVANS, WEAVER and PRESTON, JJ., concur.

DAVIDSON BROTHERS COMPANY, Appellee, v. DES MOINES CITY
RAILWAY COMPANY, Appellant.

NEGLIGENCE: When Finding Not Disturbed on Appeal. Defend-

- 1 ant's negligence having been found by the jury, such finding will not be disturbed on appeal if the evidence, when given its most favorable construction in plaintiff's behalf, affords any reasonable or substantial support therefor. Evidence reviewed and held to support the jury's finding that a street railway, in running its car around a street corner and into a vehicle was negligent.

NEGLIGENCE: Vehicle in Known Place of Danger—Contributory

- 2 **Negligence.** Placing a vehicle in a public street in position where it can be hit by a passing street car is not necessarily contributory negligence. Evidence reviewed and held to show that the driver was not negligent *per se* in so placing his delivery truck.

NEGLIGENCE: Ordinary Care—"Last Clear Chance"—Instructions.

- 3 An instruction that the jury might find defendant negligent if he knew or in the exercise of ordinary care ought to have known that plaintiff's truck was in a place of danger in time to stop the car and avoid the injury, and did not do so, is not a statement of the "last clear chance" doctrine.

NEGLIGENCE: Failure to Stop Car—Evidence—Speed of Car. Under

- 4 an assignment of negligence in that defendant negligently failed to stop its car and avoid the injury, evidence as to the *speed* of the car is admissible, even though the speed of the car was not specifically assigned as negligence.

EVIDENCE: Value—Article Bought of Reputable Firm—Competency

- 5 **of Witness.** Witness held competent to testify to the value of an axle for a truck, even though the axle in question was the only one he had ever bought, and he judged of its value from the fact that he bought it of a reputable firm dealing in such articles, and believed the price they charged was the reasonable value.

APPEAL AND ERROR: Omnibus Assignments Disregarded. An
6 omnibus assignment of error covering numerous items or points, for an understanding of which the court must search through the abstract or transcript, will be disregarded.

APPEAL AND ERROR: Cross-Examination—Harmless Error.
7 Where a witness had testified that after he had warned defendant of the danger, the defendant rang the bell yet did not stop, it was perfectly proper to ask the defendant on cross-examination whether he did ring the bell. An answer, "I can't remember whether I did or not" is especially harmless.

Appeal from Polk District Court.—HON. C. S. BRADSHAW,
Judge.

FRIDAY, JUNE 18, 1915.

ACTION at law to recover damages for an injury to a delivery wagon or truck owned by plaintiff, alleged to have been occasioned by the negligence of defendant's servants. There was a verdict for plaintiff for \$148.69, and from the judgment entered thereon, the defendant appeals.—*Affirmed.*

Parker, Parrish & Miller, for appellant.

Miller & Wallingford and *O. H. Miller*, for appellee.

WEAVER, J.—The defendant operates a street railway system in the city of Des Moines. The plaintiff carries on a wholesale fruit and produce business in the same city and makes use of an auto truck for the delivery of goods sold to local retail merchants. On January 12, 1912, the plaintiff, having occasion to deliver certain goods at the store of Moon Brothers, which fronts south upon Easton Boulevard, one door west of its intersection with East Twenty-fourth Street, sent an employee, one Hablitz, to perform that service. Along the middle of the boulevard in front of Moons' store is the track of the defendant's Walker Street line. This line ends at Twenty-fourth Street, where cars coming from the west on the boulevard make the turn for their return trip by the use of a "Y," which extends north the necessary distance on

Twenty-fourth Street. On the corner lot between Moons' and Twenty-fourth Street is a drug store which, to a greater or less extent, serves to hide the view of a car on the "Y" from a person in the street in front of Moons'. There was snow on the street, but its depth and the extent and size of the drifts and the obstruction therefrom, if any, to the convenient use of the street are matters upon which there is considerable conflict in the evidence. On the occasion now under inquiry, plaintiff's employee drove the truck to the front of Moons' store for the purpose of delivering the goods. While he was so engaged, one of the defendant's cars which had been out on the "Y" track came back around the corner into the boulevard and into collision with the standing truck, causing the injuries complained of. Alleging that such collision and injury were occasioned by the negligence of defendant's servants in the management of the car, and without contributory negligence by plaintiff or its employee, this action is brought to recover damages. The negligence charged is alleged to have been manifested (1) in failure to exercise due care to stop the car and thus prevent the collision; and (2) in the further fact that the truck was standing at rest and merchandise was being unloaded therefrom in plain view of the persons managing the car, who failed to heed the signal or alarm given by the driver or to stop and give him opportunity to move the truck to a position of safety. The allegations of the petition are denied by the answer.

I. Appellant submits the proposition that there is no substantial showing of negligence on its part, and that a verdict should, therefore, have been directed in its favor.

1. **NEGLIGENCE:**
when not dis-
turbed on
appeal. Bearing in mind the elementary rule that, the jury having found the defendant negligent as charged, the court on appeal will not disturb the finding if the evidence, when given its most favorable construction in plaintiff's behalf, affords any reasonable or substantial support therefor, we have no trouble in saying that the objection is not well taken. The evidence on the part

of plaintiff fairly tends to show that from the moment the car came from behind the screen afforded by the drug store, the truck was in plain view of the motorman; but he continued around the curve a distance of thirty to thirty-five feet into the boulevard and into the collision without stopping, although the driver of the truck, standing upon the track at or near the rear of the truck, threw up his hands and signaled him to stop. According to the motorman's own statement, he was moving very slowly—about one mile per hour—and he could readily have avoided the accident. He says, "When we were coming around the curve I think we were going not over a mile an hour and I was just taking my time in coming around the curve. I was moving slowly. When I got toward the curve I noticed the auto there close to the track." He further states that, as he came up to the truck, he noticed it was close, but the front end of the car cleared it and he continued his course until the rear steps, which projected outward beyond the body of the car, hit the truck. Plaintiff's testimony is to the effect that the car was moving more rapidly, perhaps five miles an hour, and raked its whole length against the truck. It is a fair inference from his own statement that the motorman knew the nearness of the truck to the railway track; but finding in his slow approach that the front end of his car was clearing the obstruction, he forgot for the moment the danger to be apprehended from the projecting steps at the rear, and thus brought about the injury. If so, the question of his negligence was clearly one for the jury. And even if he was not forgetful and continued to move his car in the honest belief or opinion that there was room for him to pass without colliding with the truck, the position of which was directly under his eye, it would still be a question of fact and not of law whether he was exercising that reasonable measure of care that his duty required. Still again, the jury could have found under the evidence that Hablitz, standing upon the track, signaled the car in time to stop before reaching the truck, and if this be true, it could

well be said that the motorman saw it, or, in the exercise of due care, ought to have seen it, and his failure to heed it was negligence.

II. Is the plaintiff's driver chargeable with contributory negligence as a matter of law? This is affirmed by the appellant on the ground that the driver stopped the truck at a

2. NEGLIGENCE :
vehicle in
known place
of danger :
contributory
negligence.

place where he knew it would not clear a passing car. In our judgment, this fact, if conceded, does not conclusively negative the exercise of reasonable care on his part. He was not a trespasser. He could rightfully stand his truck in position to enable him to unload his goods. According to his testimony, the street was blocked with snow, which was to some extent heaped and drifted, leaving just room enough for a wagon. The width of the passable part of the street between the track and Moons' store, he estimates at six feet, and his truck was ten and a half feet in length. He stopped with the front end of the truck nearest the store, the body of the vehicle angling to the west and the rear end nearer to the car track. The car in question was out of sight on the "Y" and he did not know of its presence until it came past the end of the drug store to take the curve in his direction. There was evidently not time for him then to mount the truck, start his engine and move out of the way, and he sought to stop the car by standing on the track and signaling the motorman. While he says, in one part of his testimony, with reference to the place where he stood his truck, "If I knew of the car I would have drove up so he would have cleared," and also stated that he knew it was not in the clear, he further testified:

"If I had known I was going to hit there, I could not have driven up a little farther; the snow was too deep. I won't say it was three feet, but deep enough so I could not get in there. I understand these motors and what they can do, so I did not try it. I was not scared of the car hitting

me and wrecking me, it would take only five minutes to unload the stuff. I made no attempt to go farther in, for I knew I could not get in any further."

There was evidence on the part of the appellant denying the existence of any serious obstruction of the street by snow and indicating that the truck could have been driven nearer the curb, but the conflict is not for this court to decide. In no aspect of the evidence can we say it shows conclusively a want of care by the driver. As already suggested, he was rightfully in the street and engaged in the performance of a lawful act which was, at most, a matter of a few short minutes. If, in view of the condition of the street, he used reasonable care to so place his truck as not to unnecessarily obstruct the use of the public way by others, including the railway company, and was proceeding promptly to discharge his load, it would be a most arbitrary holding to charge him with negligence as a matter of law, even though he knew that his vehicle did not wholly clear the street car track. The court did not err in submitting the question of contributory negligence to the jury.

Quite parallel in point of principle is the recent Massachusetts case of *Donovan v. Ry. Co.*, 99 N. E. 956. In that case, the plaintiff, driving a delivery wagon, backed up in front of a store and was in the act of unloading goods, when the wagon was struck by a passing street car. Upon appeal from a verdict by the plaintiff, it was argued, as it is here, that the driver was negligent, but the court said:

"It could not be ruled as a matter of law that the plaintiff was not in the exercise of due care. He had the right to back his wagon up to the store as he did and he testified before doing so, 'I looked up and down the street for a car, but saw none.' It was for the jury to say whether, in view of the frequency with which cars came along the track, he should have looked again before or while attempting to unload

the barrel, or whether he did all that could be done to avoid an accident after he heard the gong or saw the car."

There is nothing in any of our cases which requires a different conclusion on our part, and the rule which we here apply is in strict accord with approved principles governing the use of public streets and highways.

III. Error is assigned upon the giving of the sixth paragraph of the court's instructions to the jury

3. NEGLIGENCE: ordinary care: "last clear chance": instructions. because it is said to charge the jury upon the doctrine of the last fair chance. The following extract from the paragraph criticised sufficiently indicates its effect:

"It was the duty of defendant's employees, in charge of said car, to exercise ordinary care to determine whether or not plaintiff's auto truck was in a place of danger, and to avoid the injury thereto. If said employees, or either of them, knew, or in the exercise of ordinary care should have known, that plaintiff's auto truck was in a place of danger, in time to stop said car and avoid the injury to said auto truck, and failed to so stop the car, you would be justified in finding the defendant guilty of negligence."

This, it will be readily seen, is not a statement of the last fair chance principle, but rather a clear and explicit statement of the duty of the persons in charge of the car to keep proper lookout as they moved through the street to avoid collision with other persons or vehicles rightfully being or moving upon the public way. That there is a duty to keep such lookout and to avoid injury to others whom the company's servants see or ought to see in a place of danger and that failure in this respect is negligence is too thoroughly settled to permit argument or citation of cases. But see *Barry v. Ry. Co.*, 119 Iowa 62, and the later cases in which that precedent has since been cited and followed.

We may add also that, even if the instruction challenged could be construed as a statement of the rule to which appellant objects, it would not be erroneous. For, assuming that Hablitz was negligent in the placing of his truck, no peril arose therefrom until the street car came around the corner; and there is evidence from which the jury could find that, upon its appearance, Hablitz at once sought to avert the collision by signaling the motorman in time for the latter to stop. If the motorman saw the signal and failed to stop, or if he failed to see it because of his want of proper attention to his duties, then he was negligent and appellant would be liable for the damages, notwithstanding the prior negligence of the driver. On this point, see *Barry Case, supra*; *Latson v. Transit Co. (Mo.)*, 91 S. W. 109; *Keeney v. Ry. Co. (Mass.)*, 96 N. E. 73; and the *Donovan Case, supra*.

IV. Numerous errors are assigned upon rulings admitting and rejecting testimony. Of these, we mention the following:

The court permitted the plaintiff to testify to the speed at which the car was moving, and this is said to be erroneous because the petition did not charge excessive speed as a ground of negligence. The speed of the car was, nevertheless, a legitimate subject of inquiry.

4. NEGLIGENCE: failure to stop
car: evidence: speed of car. Negligence was charged in the failure of the appellant to stop its car and avoid the injury.

Whether the motorman could or could not have stopped the car by the use of prompt and reasonable care depended in a material degree upon the rate at which he was moving. He himself says he was moving very slowly and had his car under perfect control, and if this be true, so much the more readily could he have observed the signals given and brought the car to a standstill before striking the truck. The evidence was properly admitted.

It was a part of plaintiff's claim that the injury to the truck necessitated the furnishing of a new axle, and witness,

having testified that he knew the value of the one obtained for that purpose, said it was worth, delivered,

5. EVIDENCE: value: article bought of reputable firm: competency of witness. \$45.00. On cross-examination, he said this was the only axle he had ever purchased and that he judged of its value from the fact that he bought it from a reputable firm engaged in

that business and believed that the price they gave was its fair value. Thereupon, appellant moved the court to withdraw from the jury the testimony of the witness on this point, and the motion was overruled. The fact that the abstract does not state the grounds assigned for the motion is reason enough for not sustaining the exception. If we would be authorized to assume that the ground relied upon was the incompetence of the witness to testify to values, we still think the ruling not erroneous. The witness himself bought the axle in the market of a dealer engaged in that business, and while he may not have been an expert on that subject, he was not disqualified to give an opinion. Moreover, another witness, a dealer in such articles, testified, giving the same estimate of the value of the axle, and no witness attempts to place the value at any smaller figure.

Again, it is said that the court erred in permitting the witness Lyon to testify to certain items of expense or damage mentioned and numbered 7 to 17. It is a familiar rule frequently applied in this court that an omnibus

6. APPEAL AND ERROR: omnibus assignments disregarded. exception or assignment of error covering numerous items or points, for an understanding of which the court must search through the abstract or transcript, will not be considered.

Hablitz testified that, when he signaled the car to stop, the motorman rang the bell but continued to come on. The motorman, having testified for the appellant, was asked on

7. APPEAL AND ERROR: cross-examination: harmless error. cross-examination whether he rang the bell as he approached the truck, and over the objection, was allowed to answer, "I can't remember whether I did or not." So also,

upon cross-examination of the conductor, he was asked how

far the car step projected into the street, and over like objection, answered, "I can't say how far it would." It seems hardly necessary to say that these questions and answers, whether strictly cross-examination or not, can, upon no reasonable theory, be held in the least degree prejudicial to the appellant. The fact called for in each case was pertinent and proper for the consideration of the jury; but in each instance, the witness in substance simply answered that he did not remember. The assignment of error in this respect is without merit.

We shall not extend this opinion to consider the other assignments. So far as they fairly arise upon the record, they are sufficiently covered and ruled by the conclusions we have already announced. No good reason is shown for setting aside the verdict, and the judgment rendered thereon will be—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

FOUR TRACTION AUTO COMPANY, Appellee, v. RUDOLPH
HURNI, Appellant.

SALES: Contract Evidenced by Letter—Duty of Court to Construe.

- 1 When a buyer is informed by letter of the specific terms on which an article is sold and shipped and the buyer receives the article in accordance therewith, the contract is complete and the construction thereof is solely for the court, irrespective of other subsequent correspondence.

SALES: Rescission—Unwarranted Dominion Over Property—Rescission Right Forfeited.

- 2 An executed contract of sale may be rescinded for breach of an express written warranty. To determine this question of rescission, the purchaser may, in the light of the warranty, fairly test the article purchased. But let the purchaser beware! He must not, in violation of the warranty, assume a forbidden control over such property. Such control may work a forfeiture of his right to rescind. So held in the overloading and altering of an auto truck.

PRINCIPLE APPLIED: An auto truck was rated at 3,000 pounds capacity. Damages from misuse and neglect, and repairs

and alterations outside the vendor's factory without the vendor's written consent, were specifically excepted from the written warranty. The purchaser loaded the truck to at least 3,600 pounds. Repeated and expensive repairs and alterations were made on the machine in violation of these terms of the warranty. *Held*, the purchaser had forfeited his right to rescind the contract.

Appeal from Woodbury District Court.—HON. GEORGE JEPSON, Judge.

FRIDAY, JUNE 18, 1915.

ACTION at law in two counts, the first upon a sale and delivery of an auto truck and to recover the agreed price therefor; the second count to recover upon a note given for the purchase price of the truck. Defendant claimed the truck did not meet the conditions and comply with the contract. For reply, plaintiff pleaded a waiver or loss of the right to return the truck because of certain changes and repairs made by defendant without the written consent of plaintiff, contrary to the terms of the contract and the warranty under which the machine was sold. Trial to a jury. At the close of all the evidence, the court sustained plaintiff's motion for a directed verdict, and judgment was rendered against the defendant. Defendant appeals.—*Affirmed*.

Edwin J. Stason and W. G. Sears, for appellant.

Carter, Brackney & Carter, for appellee.

PRESTON, J.—1. Defendant was doing business at Sioux City, Iowa, under the firm or trade name of R. Hurni Packing Company. About the first of January, 1910, and before the correspondence hereafter set out, defendant and his engineer, or master mechanic, went to plaintiff's factory at Mankato, Minnesota, and inspected and tried the truck that was later shipped to defendant. On January 24, 1910, defendant wrote plaintiff a letter, making a proposition for the purchase of the truck. This letter follows:

"Sioux City, Iowa, January 24, 1910.—The Four Traction Auto Company, Mankato, Minn. Gentlemen:—Taking up the matter of purchasing one of your auto trucks we wish to make you a proposition. We will take the truck you offered to our Mr. Hurni, when he was in Mankato, for \$2,000.00 with the addition of three oil lamps, horn, tool kit, four chains, one storage battery and six dry batteries, in the following way: We will buy the truck on six months' time, giving you a note for six months, without interest for the full purchase price. If the truck proves to be what you warrant it to be in every way, we will accept it at the end of six months and take up our note. If the truck does not prove satisfactory we will be obliged to refuse same.

"We have considerable faith in your truck, from what we have seen of it, but as it is a new truck and has not had the chance to stand the test of durability and other things that are essential in a good truck, we would not care to purchase one, only on the above conditions.

"There is a very fine field here to place a good many trucks and if you decide to sell to us the truck as above, we believe it will be an easy matter, if your truck is what we believe it to be, for you to place a good many here in Sioux City.

"You, no doubt, know that placing the first truck in a community, is sometimes a very hard thing to do, but if once started and proven satisfactory, the rest is quite easy. If you decide to sell us the truck, and it proves satisfactory, you can easily make arrangements with us to demonstrate and boost your truck, which would mean a great deal to you in establishing your truck in this section of the country.

R. Hurni Packing Co., Per R. Hurni.

"P. S. The note we would give you will be a bankable piece of paper, and if you have faith in your machine, you can get money on same any time. R. Hurni Packing Co."

January 25, 1910, plaintiff made a counter proposition by letter as follows:

"January Twenty-fifth, 1910.—R. Hurni Packing Co., Sioux City, Iowa. Gentlemen:—We have your esteemed favor of January 24th and note contents. Our list price on the Model 'E' Truck you mention is \$2,650.00, and of this amount we figure 20 per cent for agency commission. The truck would then net us \$2,130.00.

"You can readily understand that our present ambition is not so much to make a large profit as it is to get our cars on the market and with this in mind we have deducted \$130.00 and made you a price of \$2,000.00 on this truck. We feel that this is all we can stand in the way of reduction even if necessary to lose present sale of the truck. At the same time we need the money as our capital is limited and it would be necessary for us to discount your note and that would be a further deduction of \$60.00.

"We are willing to make you the following proposition to show you that we have faith in our car:

"We will take your note for \$2,000.00 for six months at six per cent and deliver the car to the railroad in this city with the following equipment:

"Two side and one rear oil lamps, horn, tool kit, wheel chains, one storage battery and six dry batteries and we will guarantee the car as per the inclosed written guarantee.

"We have faith in our car and know that should you decide to purchase it there will be no question as to you keeping it and being satisfied with it beyond your expectations.

"The above offer is made to you for immediate acceptance as there are other parties now negotiating for the purchase of this truck. Four Traction Auto Co."

In response to the above letter, defendant wrote under date of January 29, 1910, as follows:

"January 29, 1910.—Four Traction Auto Co., Mankato, Minn. Gentlemen:—We are in receipt of your favor of the

25th inst. stating your terms on your Model 'E' Truck, and we have considered same. We have decided to accept your offer of \$2,000 for this truck, payment to be made by giving you our note for six months at 6 per cent from date of note. Amount of note \$2,000, and dated and made same day that truck is received in Sioux City. As per our former proposition, we will give this truck a fair trial for six months, and if it proves satisfactory during said period we will accept same and take up our note, and if not we will be obliged to refuse same.

"As we have stated before, we have every confidence in your machine, if we did not, we would not have made you an offer, for we have had some very flattering offers made to us by different firms, to get their machines introduced into this territory. From what we have seen and can judge of your truck, we believe it to be the best we have seen up to this time and we sincerely hope we will not be disappointed, for we will be just as anxious as you are to have this truck prove to be a winner.

"After having tried this truck for a short time, if we decide it is worth pushing and recommending, we will be pleased to take your agency for Sioux City. This machine will be used all over this city, on all kinds of roads and in every kind of weather and we believe we will have the best kind of opportunities to demonstrate and prove the worth of your truck and make a good many sales for you. If you decide to take this proposition into consideration, let us know what you will be willing to do on a commission basis.

"Our Mr. Hurni stated that you were to furnish a jack with this truck in addition to the other equipment already mentioned. Kindly see that a jack is included in this order.

"You may make the shipment at once and it will not be very long before the first 'Four Wheel Gear Drive Auto Made in the U. S.' will be doing business in Sioux City.

R. Hurni Packing Co."

February 1, 1910, plaintiff wrote defendant as follows:

"February First, 1910.—R. Hurni Packing Co., Sioux City, Ia. Gentlemen:—We have your esteemed favor of the 29th and have entered your order on one Model 'E' one and one-half Ton Truck with the following equipment:

"Two side and one rear oil lamps, horn, tool kit, wheel chains, one storage battery, six dry batteries and one jack.

"We are awaiting the arrival of a shipment of lamps and tool kits and as soon as they get here we will ship the car; or if the delay appears to be too long we will ship the car without equipment and express that to you when it arrives.

"We are entering your order upon the conditions as stated in our previous correspondence, to wit:

"Upon the arrival of the truck in Sioux City you are to make to us a promissory note of \$2,000.00 (bankable paper), the purchase price of the car f. o. b. Mankato, Minn., with interest at 6 per cent per annum due in six months from above date. You are to use the car for six months under the terms of our warranty which you already have and if at the end of that time we have not complied with its terms in every measure, you are to return the truck and we are to return your note cancelled, otherwise you are to take up the note and 'BOOST.'

"We have arranged with agents we now have to pay 20 per cent commission on every car sold at list price and we will be glad to offer you the same terms the territory to be arranged as soon as you are convinced that our car merits your consideration.

"We are anxious to see the Kato 'doing business' in your city and we will hasten shipment as fast as possible.

Four Traction Auto Co."

The written warranty referred to in said correspondence and accompanying the same is as follows:

“OUR WARRANTY

“We guarantee our product for one year from the date of shipment, against defective workmanship or material. Breakages occurring within that time by reason of defective workmanship or material will be replaced free of charge when such part or parts are returned to us for inspection, express or freight prepaid. This guarantee does not apply to damages resulting from accident, misuse or neglect nor does it apply to tires or the batteries or coil.

“We cannot accept any responsibility to the purchaser of our goods when said goods have been altered or repaired outside of our factory unless we have previously given our consent to such alterations or repairs in writing. Four Traction Auto Co., Mankato, Minn.”

Thereupon plaintiff shipped to defendant and delivered to the railroad company for him f. o. b. Mankato, Minn., the truck in question. The machine arrived at Sioux City, February 9, 1910, and defendant paid the freight, unloaded it and commenced its use. After the truck had been so received, and on February 17, 1910, the defendant mailed to plaintiff his note for \$2,000.00, dated February 9, 1910, and a proposed written contract for execution by plaintiff. The note was not bankable, as had been suggested in some of the correspondence and contained the clause, “Subject to the conditions of a certain contract of even date herewith for the purchase of an automobile truck.” We deem it unnecessary to set out the memorandum for contract.

February 19, 1910, the plaintiff wrote defendant a letter, so much of which as is now material is as follows:

“We have your favor of the 17th inclosing contract and note and have gone over same carefully. The contract does not altogether meet with our approval, and in our opinion does not meet the terms of sale. We object to the second clause of the contract which reads as follows: ‘It is also

agreed by and between the parties that should the automobile truck prove unsatisfactory to the party of the second part during the six months following the date of this contract by reason of defective workmanship or material, it may be returned by the party of the first part and the aforementioned note cancelled and this contract null and void.' And we also object to the reference in the next clause concerning damages affecting the utility or usefulness of the truck. . . . If you will kindly refer to our letter of the first instant and couple it with the warranty we inclosed, you have a more liberal contract than you could secure from any other maker in the country. We have given you six months in which to pay for it and in that time the car should earn you enough to pay for itself if you have the hauling we think you have. Under the terms of our warranty to you we are going to keep that car in perfect condition for a year, accidents and abuse excepted, and if it was going to develop defects at all it certainly would in that length of time. . . . The note you sent us is a conditional note and we would be unable to negotiate it in this territory until after maturity. . . . Our letter first, together with the warranty, is a clear contract, without quibbling or unnecessary verbiage, contracting against mechanical defect for one year, with the privilege to you to return the car at the end of six months, if we fail to replace defective parts. In other words, your car must be kept mechanically perfect for one year. You stand upon this warranty and forward to us a note without condition so that we may take it to a local bank and deposit it as so much money; and if at the end of the six months the car comes back you will have no difficulty in getting back the \$2,000.00 and interest."

To this, defendant replied on March 1st, stating in substance that defendant was surprised at the contents of plaintiff's letter of the 19th, and claiming that the written memorandum for contract conformed to the statements in

the correspondence. Soon after the truck was received by defendant on February 9th, a key was sheared, necessitating the return of a shaft to Mankato, which was replaced by plaintiff, and on February 15th, plaintiff wrote defendant as follows:

"Mankato, Minn., Feb. 15, 1910.—R. Hurni Packing Company, Sioux City, Iowa. Gentlemen:—We are shipping you by express key and shaft to replace the one sheared in your Kato car. We cannot bear any responsibility in the future for damages resulting from overloading the truck. This truck has a capacity of one and a half tons and will stand some overload, but not nearly another ton as you had on when this key was sheared. If your driver will bear this in mind, he will have no difficulty with the car. In regard to the note you were to send us upon the day the car arrived in Sioux City, we have not received it as yet. Kindly give this your immediate attention. Four Traction Auto Co., E. R. Brown."

It is thought by appellant that there is a conflict in the testimony as to what the contract was and that, therefore, the matter should have been submitted to the jury. Appel-

1. SALES: contract evidenced by letter: duty of court to construe. lant also contends that the correspondence between the parties after the shipment of the truck and its receipt by defendant on February 9th should be considered as a part of the contract. But there is no dispute as to the writing of the letters by plaintiff and defendant which we have already set out, and the interpretation or construction of them is a question for the court. We think there was a meeting of the minds and a completed contract of sale as shown by the letters which culminated in the shipment of the machine, together with the written warranty of plaintiff. Appellee's letter of February 1st clearly embodies the terms upon which the order is entered and the truck shipped; and when the truck was shipped, the defendant did not refuse to receive it, but paid the freight,

unloaded the truck from the cars and began the use of it, without objection to the terms named. On July 25, 1910, and again on July 29th, defendant notified plaintiff that the truck was unsatisfactory and that they had tried it for six months. Defendant claims there were other difficulties with the machine, but according to appellant's claim, this developed soon after he commenced using the truck. His claim is that it would stall; that it had to be taken frequently to the garage; that the chief difficulty appears to have been in the assembling of the parts and in the application of the power and in the engine; that the plan of the truck was novel and an experiment.

2. Taking up now first the question as to the waiver pleaded by the plaintiff, it is alleged by plaintiff in the reply:

"Plaintiff for further reply states that said truck was improperly used and handled by said defendant while in defendant's possession; that said truck was overloaded beyond its rated capacity; that said defendant made or caused to be made repairs to said truck by persons other than the plaintiff, and outside of plaintiff's factory, contrary to the terms of the contract and agreement between plaintiff and said defendant; and that said defendant did in other respects misuse the truck in question.

"Plaintiff for further reply states that said defendant, in the making of repairs upon said truck in a manner other and different than is provided for in the written guaranty and contract and agreement between plaintiff and said defendant, thereby accepted said truck as its own, and thereby waived any right to refuse said truck or to return the same to plaintiff, and the said truck thereupon became the absolute property of said defendant without any right in said defendant to refuse or return the same."

The testimony shows that the truck had at different times been overloaded. At one time, when there was an accident to

the machine, plaintiff claims it had a load of forty-six hundred pounds. Defendant claims it was only loaded with thirty-six hundred pounds. But the record is that the truck was rated at one and one-half tons.

The record further shows that, contrary to the terms of the contract and of the written warranty, the appellant, while the truck was in his possession, had repairs made repeatedly at a garage in Sioux City, and had alterations made in the truck itself, changing and altering certain parts of the machine and adding other parts to it. Defendant testifies that his master mechanic put a couple of iron rods on each side of the truck to keep the wheels going straight; says he knows the changes were made, and that they had to do it. He further says: "I do not know how many times I had the truck repaired in Sioux City, probably about twenty times, more or less."

Another witness for defendant says: "One repair was a drive shaft. It was split; I remember that, and we put in a new one; it was an axle shaft. The key had stripped off the gearing."

The same witness says: "The engine did not have enough power and we tried to get more power out of it and tried to change it, tried to change adjustments and things like that."

Another witness says that when he was trying to sell defendant a touring car and while he was making repairs on the truck, he put in a new shaft. He says further: "I am not sure it was a live shaft. A live shaft is connected to a wheel and a drive shaft drives the gears in the differentials. I think it was a live shaft that was broken."

Witness Straub, an automobile repair man, testified that he could tell from an exhibit what work was done on the truck in question. May 7th, seven hours; same day, five and a half hours; on the 9th, three and a half hours by one workman, and the same day, ten hours by another; on the 10th, eight and a half hours by two workmen, and the same day,

ten hours by another party; on the 11th, three hours by one person, two hours by another, and a half hour by another; and same day, eight hours by the witness himself; and on the same exhibit is two hours babbitting; April 17th, two hours babbitting.

Witness Genehm testifies from a shop card of his employer and says that it is for the overhauling for the engine of this truck; says he spent quite a few days in overhauling. He testifies further:

"I think the work was done on the valves and the cylinders and cleaning out the engine. I am pretty sure they put in new valves. I think we put in tapered valves. I suppose these valves remained on the engine when it left the shop, and still remain on it so far as I know. It was not a flat valve. A tapered valve is different from a flat one. The engine had flat valves instead of tapered ones and they had trouble with the timing. The valve stem got bent with the heat from the engine. To correct that I put in tapered valves instead of flat ones."

As stated, all these things were done without the written consent of the plaintiff and contrary to the terms of the contract and the warranty. Under our decisions, a purchaser ordinarily has the right to rescind an executed contract of sale for the breach of warranty. *Upton Mfg. Co. v. Huiske*, 69 Iowa 557; *Gay Oil Co. v. Roach*, 27 L. R. A. (N. S.) 914, 921.

The purchaser has a right to fairly test the machine to learn whether it complies with the warranty and to rescind within a reasonable time if it is not as warranted. *Billmeyer v. Queen Mfg. Co.*, 150 Iowa 318, 323; *Bradley v. Palen*, 78 Iowa 126, 129. But in making the rescission, it is the purchaser's duty to put the other party as near as possible in *statu quo*, and is required to return the machine in the same condition as near as possible that it was when he received it. *Upton Mfg. Co. v. Huiske*, *supra*. Plaintiff was not required

to receive the truck back if the defendant during the time he had it in his possession misused and damaged it. *Bradley v. Palen, supra*.

Under the warranty in this case, defendant did not have the right to repair or alter the truck without the consent of the plaintiff. The undisputed evidence shows that he did make many changes and many repairs. A party may not rebuild a machine according to his own notions as to what is necessary under such a warranty. We think the trial court properly directed a verdict on this ground.

3. Questions as to the warranty are argued, but, in view of the fact that the discussion so far decides the case, we shall refer to this matter briefly. Cases cited by appellant are distinguishable from the case at bar. Some of them are cases where the question involved was as to executory contracts for the sale of personal property not open to inspection of the buyer and not in existence when the contract was made. In such cases it has been held that, in the absence of an express warranty, there may be an implied warranty that the property to be furnished should be merchantable or suitable for the purposes for which it was purchased. Such was the situation in *Russell v. Critchfield*, 75 Iowa 69; *Blackmore v. Fairbanks*, 79 Iowa 282; and like cases.

Appellee contends that the case at bar is upon a written contract of sale containing an express warranty of a known machine manufactured and in existence at the time of the sale, and open to the inspection of the buyer, and which was in fact inspected by the buyer, and contends that the written warranty excludes any other additional or different parol warranty. In support of its contention, plaintiff cites: *Shepherd v. Gilroy*, 46 Iowa 193; *Mast v. Pearce*, 58 Iowa 579; *Nichols v. Wyman*, 71 Iowa 160; *Warbasse v. Card*, 74 Iowa 306; *Western Electric Co. v. Baerthel*, 127 Iowa 467; *Electric Company v. Waterloo Ry.*, 138 Iowa 369; *Seitz v. Brewers' Co.*, 141 U. S. 510 (35 L. Ed. 837).

Appellee concedes that there may be an implied war-

ranty that a known machine already manufactured and inspected is suitable for the purpose for which it was built, but disputes the proposition contended for by appellant that there was any warranty, either express or implied, that the truck was suitable for any particular purpose for which defendant desired to use it. We are inclined to this view, but, as stated, in view of the fact that the case is determined by a prior point, we shall not discuss the case further.

As stated, the petition is in two counts. Plaintiff relies more strongly upon the first count, which is on the sale of the machine and not on the note. The ruling of the trial court does not indicate the ground upon which the motion was sustained.

Under the record, we think the court properly directed a verdict for plaintiff, and the judgment is, therefore,—*Affirmed.*

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

CHARLES P. GROVES, Appellee, v. EMMA GROVES, Appellant.

DIVORCE: Cruel and Inhuman Treatment—Insufficiency of Evidence to Establish. Evidence reviewed and held insufficient to justify a decree of divorce on the grounds of cruel and inhuman treatment.

Appeal from Lee District Court.—HON. W. S. HAMILTON, Judge.

FRIDAY, JUNE 18, 1915.

ACTION for divorce. Decree for the plaintiff and defendant appeals.—*Reversed.*

E. C. Weber, for appellant.

No appearance for appellee.

WEAVER, J.—The plaintiff petitioned for divorce because of alleged cruel and inhuman treatment endangering his life. Defendant denied the charges of cruelty and averred in substance that in so far as she upon any occasion said or did anything to the injury of plaintiff she had been provoked or driven thereto by the misconduct of the plaintiff and by his ill-treatment of her. She further alleges that her acts, if any, of which plaintiff could have truthfully complained were afterwards condoned by him. She further charges him with wilful desertion of her, and expresses her willingness to restore their family relations and to live with plaintiff as his wife. The trial court found for the plaintiff and granted him a divorce, but adjudged and required him to pay to the defendant a stated sum for the support of their infant son and to pay the costs of the action. The defendant appeals.

As the appellee has made no appearance in this court, there is no argument or statement of his theory of the case, except as we may obtain it from his petition and the record of the trial in the court below. Looking to

1. DIVORCE:
cruel and in-
human treat-
ment: insuffi-
ciency of evi-
dence to estab-
lish.

the abstract, we find that in his original petition the allegations of cruel treatment are confined to the charge that, in the presence of his family and throughout the neighborhood, defendant "circulated false and malicious reports concerning her husband," and that in July, 1912, she drew and pointed a revolver at the plaintiff and threatened to take his life. No attempt was made to specify the nature of the false and malicious reports, nor was there any allegation that such conduct on defendant's part had any tendency to endanger the plaintiff's life. Later, and after defendant had appeared and answered, plaintiff amended his petition by alleging that defendant had been guilty of inhuman treatment endangering his life, in that, in the year 1910, defendant without provocation assaulted him and struck him with a stove poker; that when he was ill she refused to procure him medical attendance; that she often gave way to fits of ungovernable temper

and habitually swore at plaintiff and called him vile names; and that her course of conduct in this respect "impaired the health of plaintiff to the extent herein stated."

The evidence shows that the parties were married in the year 1900 and that they lived together until August, 1912, when plaintiff left his wife and home and went to Chicago, Illinois. When leaving, he kissed his wife good-by and told her he would send for her to come to Chicago. It is very plain, however, that he did not intend to live with her any longer. He did not send for her or return to her and four months later, began this action for divorce. It is quite clear that the parties did not live happily together. It is equally plain that, aside from negligible incidents of ill temper or petulance on one or both sides, the only real trouble between them is the outgrowth of jealousy. On one occasion, plaintiff was excited to anger over what he considered the unbecoming freedom of conduct between his wife and a street car conductor and this led to an angry altercation between the parties; but as this is the only incident in which he questioned her relations with other men and it occurred more than two years before their family relations were broken, it has no material significance in this case. It is undisputed, however, that for a year or two before they separated, defendant became very jealous of her husband's attentions to other women named in the record and that, growing out of this fact, there was continued bickering between them and defendant expressed her indignation quite freely to others. It is equally clear that defendant had excellent reasons for her jealousy, and whatever may be thought of the wisdom or propriety of the manner in which she manifested her resentment, it was not unnatural, and the husband who continually provoked it is the last person in the world who should be heard to complain of it, and least of all should it be made the ground for equitable relief in his favor. He admits that, while still living with his wife, he made the acquaintance of a young woman in another city, to whom he was introduced as a single

man, and that he carried on a correspondence of a more or less mushy character with her. A part of this correspondence came into the defendant's possession. Later, he paid very close and constant attention to a woman living in the same neighborhood with his family and went with her to various entertainments and functions without asking his wife to accompany them. There is also evidence that the woman in the case was divorced, that plaintiff assisted her in getting her divorce, and that afterwards, while she was living alone, plaintiff often called upon her. He knew that his wife was jealous and objected to his intimacy with the woman but he persisted in that line of conduct. As a natural result of these conditions, there occurred in June or July, 1912, the one quarrel in which any attempt at or act of physical violence is shown. The woman referred to came to the door of the house where the parties lived and entered, or was about to enter, when defendant objected to her presence and ordered her away. Thereupon plaintiff interfered and said she need not go. Defendant became excited and ran into a bedroom where a revolver was kept and laid hold of it for the purpose, as she says, of driving the woman out of the house. The plaintiff followed his wife, seized and struck her and wrested the revolver from her hand. Describing the struggle, he himself says, "I grabbed her and she said, 'You get away,' and I slapped her and threw her on the bed. It all arose from Mrs. Tufts being there. That is, that part of it started from that and Mrs. Groves got a black eye as the result. We lived together as man and wife after that." Again he says, "I struck her with my right hand. I slapped her on the jaw and finally got hold of her and threw her on the bed and took the gun away from her." Even after this, they resumed family relations, and from that time on, the plaintiff shows no other act of violence or anything which by any stretch of imagination could be called cruel or inhuman treatment endangering his life. He says he intended to return to his wife from Chicago and would have done so, only he heard

that she had taken legal advice upon the subject of prosecuting him for desertion, and thereupon he forestalled such action by suing for divorce.

The record is without support for the conclusion that the life of plaintiff has been endangered in any manner by the alleged abuse or cruelty of the defendant, and the charge that she neglected plaintiff in sickness is not proven. So lacking is the case in all apparent merit that it suggests a doubt whether the whole record is before us, but the appeal appears to have been regularly taken and the abstract purports to present all the evidence material to the issues tried. Upon such showing and in the absence of any appearance by the appellee to question or deny it, we are bound to accept it and reach our conclusions therefrom. We have, therefore, to hold that the petition for divorce should have been dismissed.

The decree below must be reversed, except as to the taxation of costs. Costs of this court will be taxed to the appellee. —*Reversed.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

EDWARD HALLORAN, Plaintiff, v. HON. WM. HUTCHINSON,
Judge, Defendant.

INTOXICATING LIQUORS: Injunction—Violation—Sale of Hard Cider. Evidence reviewed and held to show that the sale of hard cider containing 4.6% of alcohol rendered the seller guilty of contempt in violating an injunction against the sale of intoxicating liquors.

Certiorari from Lyon District Court.—HON WM. HUTCHINSON, Judge.

FRIDAY, JUNE 18, 1915.

CERTIORARI proceedings to the district court of Lyon County, to review the proceedings of that court finding the

plaintiff guilty of contempt in violating an injunction against the sale of intoxicating liquors.—*Affirmed.*

S. D. Riniker, for plaintiff.

Simon Fisher and *H. B. Pierce*, for defendants.

DEEMER, C. J.—Plaintiff, who was and is the keeper of a lunch counter and pool hall, in the town of Rock Rapids, was, on April 25, 1914, temporarily enjoined by the district court of Lyon county from the selling or keeping for sale of intoxicating liquors. The order was entered April 25, 1914, and it continued in force down until proceedings for contempt were lodged against him. The information for contempt was filed July 2, 1914, and a hearing was had thereon on the 10th day of that month. Plaintiff was charged with selling hard cider to one Bowen on June 6, 1914, and with various other illegal sales to unknown parties after the issuance of the temporary injunction; and upon hearing he was found guilty of the contempt charged.

This proceeding is to review that finding, and the main proposition relied upon is that the testimony does not warrant the conclusion of the trial court. Under our statutes, hard cider, if in fact intoxicating, is classed as an intoxicating liquor, and is under the same legal ban as other intoxicants. *State v. Hutchinson*, 72 Iowa 561. And proof that liquor used as a beverage contains an appreciable amount of alcohol is sufficient to establish its character as an intoxicant. See Code, Sec. 2382, as explained in *State v. Colvin*, 127 Iowa 632, and the cases therein cited.

There can be no doubt that Bowen purchased some cider from the plaintiff on or about June 6, 1914; for plaintiff admits it, and the proof is abundant. Some of this cider was chemically analyzed and tested a few days after its purchase of plaintiff, and was found to contain 3.68% by weight and 4.60% by volume of alcohol. Assuming that fermentation

had progressed with ordinary rapidity during the time intervening between its purchase and analysis, it must have contained, when purchased, a rather large percentage of alcohol.

A disinterested witness also testified that he smelled the cider, and that it had a very strong odor; that he would call it hard cider.

Plaintiff also testified that he drew the cider sold to Bowen from a keg which he had had for some time, and that it was from the bottom of the very last keg he had; that he told the purchaser and another that this would be the last he would get. Plaintiff and some of his witnesses testified that they thought the cider was sweet, but the testimony on the part of the State, as to the actual analysis of the cider purchased, cannot be overlooked or disregarded.

The trial court was justified in finding plaintiff guilty of the contempt charged, and the judgment must be, and it is,—*Affirmed.*

WEAVER, EVANS and PRESTON, JJ., concur.

JOE MANTON, Appellee, v. H. L. STEVENS & COMPANY et al,
Appellants.

TRIAL: Directed Verdict—Motion for—When Treated in Alternative. The suggestion is offered that occasions may arise when the court will construe a motion demanding a directed verdict in favor of *both* of two defendants, as simply a demand in the alternative,—that is, that one or the other of the defendants be dismissed.

PRINCIPLE APPLIED: Plaintiff was clearly the employee of one or the other of two defendants, M and S, from both of whom damages were claimed by reason of alleged negligence. Both defendants appeared by the same counsel, filed harmonious defenses and, at the close of the evidence, joined in the same motion for a directed verdict for each, M asserting that plaintiff was not *his* employee because S was an independent contractor, and S asserting that plaintiff was not *his* employee because he, S, was the mere agent or supervising architect of M.

The motion was sustained as to S. The suggestion is offered that this motion should be treated simply as an alternative demand.

MASTER AND SERVANT: Respondent Superior—Independent Contractor—Evidence. An independent contractor, generally speaking, is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. *Held*, in instant case, an employee was not an independent contractor.

PRINCIPLE APPLIED: An architect was employed to prepare plans and supervise construction for a percentage of actual cost. No specifications were prepared. A general plan was agreed on. Changes, generally on the recommendation of the architect, were made from time to time, and always with the consent of the owner. The owner had full control over all changes. The architect, without assuming any personal liability, entered into many contracts, but always on behalf of the owner by himself as architect. Deliveries under these contracts were to meet the approval of the architect. The recommendations of the architect were never overruled. All items of cost, both for labor and material, were controlled by the owner. All bills were paid for by the owner on approval by the architect. *Held*, the architect was not an independent contractor.

MASTER AND SERVANT: Safe Place—Duty to Keep Safe—Surrounding Work of Master. A safe place is not rendered legally unsafe by the negligence of a fellow servant. But the negligence of the master is a different matter. A safe place may be rendered unsafe by the act of the master in carrying on other work near by. The master must furnish a reasonably safe place. He must then keep it reasonably safe.

PRINCIPLE APPLIED: A master was erecting a cement structure with outer brick walls. A servant was laying brick on this wall near the bottom thereof. Without more, the place was safe. The master, through his foreman, sent workmen to the sixth floor, immediately over the bricklayer below, to tear away the wooden forms from the cement columns and beams. In doing this work, chunks of cement were necessarily, in places, torn loose. A piece of this cement fell upon the servant on the wall below, with resulting injury. *Held*, the master was responsible for the resulting unsafety of the place, even though the workmen on the upper floor were not negligent in their work.

MASTER AND SERVANT: Safe Place—Duty to Keep Safe—Act
4 of Foreman—Vice-Principal. When the *time* and *place* of doing certain work in one place vitally affect the safety of another place in which other servants are employed, the act of a foreman in directing such work to be done at a certain time and place is the act of the master.

PRINCIPLE APPLIED: (See under No. 3.)

TRIAL: Inapt Instruction—Assumption of Fact. The assumption of
5 a fact in issue is, of course, erroneous, but an inapt instruction, assuming that a certain fact has been established, may be cured by a subsequent instruction clearly stating the burden of proof as to such fact.

EVIDENCE: Future Disability—Expert Opinion on Probability—
6 **Reasonable Certainty.** A physician may testify as to *probable* future disability, even though the jury, as a finality, must meet the legal formula: "What future disabilities are *reasonably certain?*"

Appeal from Woodbury District Court.—HON. JOHN F.
OLIVER, Judge.

FRIDAY, JUNE 18, 1915.

ACTION for damages by employee against employer for personal injuries resulting from alleged negligence of the employer. The defense was a general denial and a plea of contributory negligence. There was a verdict for the plaintiff and the defendants appeal.—*Affirmed.*

D. C. Browning and *Henderson & Fribourg*, for appellee.

F. E. Gill and *Sargent, Strong & Struble*, for appellants.

EVANS, J.—The accident in question occurred in June, 1912. The plaintiff, a brick mason, was then engaged in his line of work upon one of the brick walls of a structure then in course of construction at Sioux City for the defendants Martin. The building in course of construction was a large fireproof hotel to be constructed largely of re-enforced concrete. Prior to the date of the accident, the concrete work

upon this building had been completed to a height of several stories. This concrete work included framework and supports and floors. It did not include the outside walls. These were to be built of brick. On the date of the accident, the plaintiff was engaged in laying brick in the construction of the outside east wall near the ground. While so engaged, he was severely injured on the head in some manner. His claim is that he was struck from above by a piece of hardened concrete. His skull was fractured by the blow. The evidence tends to show that at this time a wrecking gang in charge of one Anderson as an alleged foreman was at work upon the sixth floor. The duties of this gang consisted in removing the wooden forms after the concrete had set and hardened in its place. This work involved the breaking and loosening of more or less of the hardened concrete. That is to say, the timber forms became more or less imbedded in and clasped by the soft concrete, and could not be removed without breaking such clasp. The claim for the plaintiff is that one of these broken pieces of concrete fell upon him while he was engaged in his work. His claim of negligence is predicated upon the general specification that his employer failed to furnish him a reasonably safe place to work and failed to warn him of the danger overhead.

The two defendants Martin were the owners of the real estate and the building in course of construction. The defendants Stevens & Company were architects and engineers and were in general charge of the construction of the building under and by virtue of an oral contract with the Martins. At the close of the evidence, the trial court dismissed the case as to them on the ground that they appeared to have been agents only for the Martins, and that their relation to the work was that of supervising architects and engineers. It is now urged by the Martins that Stevens & Company were independent contractors and were in charge of the construction of the building as such and that the plaintiff was their servant and employee and not the employee of the

Martins; and this is one of the questions presented for our consideration.

Other defensive contentions are that the evidence was insufficient to show that the plaintiff was injured in the manner claimed; that if he was thus injured, then the injury resulted from the negligence of his fellow workmen; that plaintiff's place of work was reasonably safe within the meaning of the law and that the danger, if any, to which he was subjected therein was transitory only and was due to the progress of the work in which he and his fellow workmen were engaged; and that the employer was therefore not responsible therefor.

I. It is earnestly urged here that the trial court should have held as a matter of law that Stevens & Company were independent contractors and that the plaintiff was their employee and not that of the Martins and that

1. TRIAL: directed verdict: motion for: when treated in alternative. a verdict should have been directed for the Martins on that ground. This ground has been pressed more vigorously in this court than in the court below. The defendants were all represented in the court below by the same counsel. All of the defendants joined in a harmonious defense. The question as now presented is not specifically raised in the answer of the Martins except as it might be deemed covered by a general denial. At the close of the plaintiff's evidence, all the defendants joined in a motion for a directed verdict. This motion, being first overruled, was, at the close of all the evidence, sustained as to Stevens & Company on the ground already indicated. After this ruling, the record shows oral insistence by counsel on behalf of the Martins that the plaintiff was not their employee. The question was thereupon submitted to the jury as a disputed question of fact. The point now urged is that the trial court should have held as a matter of law that the plaintiff was not the employee of the Martins. We incline to the view that the defendants are in no position upon this record to raise such question. Their attitude before the trial

court would seem to forbid it. The final substituted answer which they filed set forth not only a defense in their own behalf but a defense also in express terms in behalf of Stevens & Company. Clearly the plaintiff was an employee of one or the other of the defendants thus named. The court could not have directed a verdict on this ground in favor of all of the defendants. The sustaining of the motion as to Stevens & Company necessarily held the Martins as the employer of the plaintiff. To dismiss the action as to the Martins would necessarily hold Stevens & Company as the employer. Inasmuch as the defendants all joined in the same motion on the same ground and were represented therein by the same counsel, there is much reason for saying that the prayer of such motion should have been deemed as in the alternative and as a demand that the action be dismissed either as to the Martins or as to Stevens & Company. Otherwise, it puts counsel in an inconsistent position in contending first that the plaintiff was not an employee of Stevens & Company; and second, that he was not the employee of the Martins. The only possible ground for the first contention would be that he was the employee of the Martins; and the only possible ground for the second contention would be that he was the employee of Stevens & Company.

Passing this question, however, we have gone into the original merits of the question. We reach the conclusion that the evidence is abundant to warrant the finding that Stevens

2. MASTER AND
SERVANT:
respondent
superior: independent contractor: evidence.

& Company were not independent contractors in their relation to this structure but that they sustained the relation of agents to the Martins and that their power and duties were those of the architect and the engineer, coupled, perhaps, with a supervisory power under which they superintended the enterprise in its entirety.

There was no written contract between them and the Martins. Their oral agreement was brief and somewhat general. Stevens testified to it as follows:

"We were employed to prepare plans and supervise the construction of this building. That was the entire contract with the exception of the agreement that fixed our compensation."

The compensation agreed on was 10 per cent of the actual cost of the building. Originally, the building was estimated at an approximate cost of \$250,000. No specifications were prepared, though a general plan was agreed on. Changes were made from time to time. These were generally upon the recommendation of the architects and always with the consent of the Martins. Stevens & Company entered into many subcontracts for material and labor. Some of these were in writing. They all purported to be made on behalf of the Martins by Stevens & Company as architects. In none of them did Stevens & Company assume personal liability. Stress is laid by appellant on the fact that in some of these contracts it was required that the deliveries thereunder should meet the approval of Stevens & Company. It is argued that this provision discloses their interest therein as contractors. The provision is entirely consistent with a contrary view. It was appropriate and consistent to make such provision for the benefit of the Martins. The very purpose of their employment of Stevens & Company as architects and engineers and superintendents was that they might have the benefit of their experience, knowledge and judgment. It was entirely consistent, therefore, that the contracts in their behalf should meet the approval of Stevens & Company as a condition precedent to acceptance.

We think the case at this point quite controlled by our previous case of *Hughbanks v. Investment Co.*, 92 Iowa 267. In its controlling facts in this regard, the case at bar is not materially different from the cited case.

Some stress is laid by appellant upon the fact that the recommendations of Stevens & Company were followed in every case throughout the construction of the building, and

that at no time did the Martins overrule or change such recommendations. It is argued, therefore, that Stevens & Company did have the actual control of the method of construction. The question at this point is not so much what the Martins did do in that regard as what they had a right to do. It is undisputed that every item of cost, both for labor and material, was incurred under the eye of the Martins. They kept a daily itemized statement of all expenditures for both labor and material, including the names of the men upon the pay roll, and paid the same upon the approval of the architects. There is nothing in the record which would warrant a holding that they were bound to Stevens & Company by any other contract than the contract for compensation at the rate of 10 per cent. They were free to increase or reduce the cost; to follow the original plans or to change them. Their right in this respect was not affected by the fact that no friction or difference of opinion arose between them and their architects in the prosecution of the work. We are clear, therefore, that the plaintiff herein must be deemed the employee of the Martins, and not that of Stevens & Company.

II. It is next urged that there was no evidence of any negligence on the part of the employer upon which the action could be predicated. The argument is that if the plaintiff

8. MASTER AND
SERVANT: safe
place: duty
to keep safe:
surrounding
work of
master.

was injured, as claimed, by a piece of concrete from the wrecking operations on the sixth floor, then he was injured by the negligence of his fellow workmen and the employer is not liable therefor. In such case,

it is said no failure to furnish a reasonably safe place to work is shown. The argument at this point is made to rest largely upon a class of cases such as *Galloway v. Turner Imp. Co.*, 148 Iowa 93; *Scherer v. Alfalfa Meal Co.*, 159 Iowa 683; *Helgeson v. Higley Co.*, 148 Iowa 587; *Peterson v. C. R. I. & P. Ry. Co.*, 149 Iowa 496.

In the cited cases, it was held that a place to work which was, in itself and in its relation to its surroundings, safe,

was not rendered legally unsafe simply because injury happened therein to the plaintiff through the negligent act of some fellow workman.

For instance, in some of the cases machinery was negligently started by a fellow workman without warning to the injured party. It was held that this did not present a case of an unsafe place to work and that the duty of the master to warn did not apply to the transitory changes that necessarily attended the progress of the work.

We need not repeat the discussion and the distinctions presented in the cited cases. We think they are not applicable to the case before us. In putting the plaintiff to work upon the ground wall he was exposed to the danger of falling material from the wrecking gang on the sixth floor. Whether he should have discovered the danger himself was a question of fact, which was appropriately submitted to the jury. In that respect, the place was unsafe. If it must be said that, in the absence of negligence by a fellow workman, the place was safe, and that only the negligence of a fellow workman would render it unsafe, then the place was safe within the meaning of the law and the defendants were not liable for the injury. The trial court instructed in substance to this effect. It instructed that the workmen of the wrecking gang were fellow workmen of the plaintiff. It instructed further that if the negligence of any one of them caused the injury to the plaintiff, then the defendants were not liable. It is clear from the evidence that there was no necessary negligence on the part of the workmen in the wrecking gang in causing the falling material. The evidence sustains the finding that they were engaged in their regular work and in the regular way and under appropriate instructions from superior authority. The nature and requirements of the work were such that more or less falling material was inevitable, even with ordinary care on their part. They were charged with no knowledge of the presence of plaintiff in an exposed place

upon the lower level. Under the instructions of the court, the jury necessarily found that the place of plaintiff's work was unsafe by reason of the operations on the sixth floor, notwithstanding the use of ordinary care by the fellow workmen. We think the evidence sufficient to sustain such a finding. Inasmuch, therefore, as the defendants worked these men upon the different levels, it was incumbent upon them to make the plaintiff's place of work reasonably safe from the danger of such falling material as would likely come upon it notwithstanding the exercise of ordinary care by the workmen above. Whether that could best be done by providing a shield above the plaintiff or by refusing to permit the men to be worked upon the different levels at the same time in such a way as to expose the one or the other to danger is not a question before us. Under the facts found by the jury, the plaintiff's place of work was not safe within the meaning of the law, even though it would have been safe if the wrecking gang had not been engaged above it.

The case is somewhat analogous in principle to those cases involving the use of high explosives in mines and pits. *Hendrickson v. Gypsum Co.*, 133 Iowa 89. The general ground of the holding in that class of cases is that a place of work otherwise safe is rendered unsafe by the use of high explosives and that the workman has no means of protecting himself therein. He is therefore entitled to warning of the use of the high explosives, in order that he may absent himself from the place of work while it is exposed to the danger of the explosive. See *Galloway v. Turner Improvement Co.*, 148 Iowa 93, 99.

In the case before us, the only effective way in which the plaintiff could have protected himself in case he had been warned would have been to absent himself from such place of work while the wrecking gang was at work upon the upper floor.

III. The alleged foreman of the wrecking gang was one Anderson. It is earnestly urged by the appellant that he

was not in truth such foreman; that he had, in fact, no authority as such, though he wrongfully assumed it.

4. MASTER AND
SERVANT: safe
place: duty
to keep safe:
act of fore-
man: vice-
principal.

It is argued, therefore, that he was a mere workman and therefore a fellow workman with the plaintiff, and that it was negligence on his part to assume to order the wrecking gang upon the sixth floor while the plaintiff was at work below, and that, therefore, the defendants were not responsible for his negligence. The finding of the jury was necessarily adverse to this contention. It is sufficient to say that evidence of Anderson's authority as a foreman was abundant to sustain such finding. The workmen exercised no discretion as to the time or place of their work but were subject to superior authority. The time and place of work of the wrecking gang entered vitally into the character of the plaintiff's place of work in regard to its safety. In view of the duty of the master to render plaintiff's place of work reasonably safe, the magisterial duty of supervision of the time and place of the wrecking work would seem to follow of necessity so far as such work affected the safety of plaintiff's place of work. We think, therefore, that Foreman Anderson must be deemed as a vice-principal, in so far as he selected and ordered the time and place of the wrecking work upon the sixth floor, whereby the plaintiff's place of work was exposed below.

Somewhat in point here is the case of *Hamm v. Bettendorf*, 147 Iowa 681. Appellants cite some authorities at this point which tend to sustain their position. *Somer v. Harrison*, 8 Atl. 799; *Donnelly v. San Francisco Bridge Co.*, 49 Pac. 559; *McPhee v. Scully*, 39 N. E. 1007; *Lach v. Burnham et al.*, 134 Fed. 688. In so far as the foregoing cases hold that the workmen on the upper floor were fellow workmen with the plaintiff and that the master was not liable for their negligence, we are in accord with them. In so far as they regard the foreman or superintendent as performing no magisterial duty under the circumstances shown herein, they

are not in harmony with what we deem the sounder rule and which we have followed in our previous cases.

IV. It is urged that the evidence was wholly insufficient to sustain a finding that the plaintiff was injured by any falling material from the sixth floor. There was some evidence tending to show that workmen were engaged upon the seventh floor in performance of the contract of some subcontractor. It is argued that the cause of the plaintiff's injury could have originated from this floor as easily as from the sixth floor, and that the evidence introduced is as consistent with one theory as with the other. The evidence was by no means conclusive that there was any work in operation on the seventh floor. The evidence is sufficient to warrant a finding by the jury that plaintiff's injury was caused by a piece of hardened cement. It also appears that the breaking of such pieces was an ordinary incident of the wrecking work which was going on upon the sixth floor. Candor could hardly reach any other conclusion than that reached by the jury at this point. It is needless to say, therefore, that we think the evidence sufficient.

5. TRIAL: inapt
instruction:
assumption of
fact.

V. Complaint is made against instruction 4 given by the trial court. The complaint is directed to the introductory sentence of such instruction which was as follows:

"Par. 4. It appears from the evidence, that about the 13th day of June, 1912, the plaintiff while employed and engaged in working as a brickmason in laying the first story of a brick wall of a two-story addition that was being constructed and attached to one of the wings of said Martin hotel, then under process of building, was injured as a result of being struck upon the head by a piece of hardened concrete, or some other object, that had fallen from some portion of said wing of said hotel building, near which he was working upon said wall."

The complaint is that the sentence assumed a fact as proven, whereas such fact was in dispute. Such introductory sentence was followed in such instruction by the following direction:

"And as you have already been told, to entitle him to recover anything on account of said injuries, he must satisfy you by a preponderance of the evidence that said injuries were caused by a falling piece of concrete that had been loosened or detached or broken either from some portion of the concrete work of the sixth story of the structure near which he was working, etc."

The introductory statement, "It appears from the evidence," was doubtless somewhat inapt. From the instruction as a whole, however, the meaning of the court is rendered quite plain. This expression was used in the sense that there was evidence to such effect. The second sentence of the instruction which we have quoted above expressly charged the jury that the burden of the proof as to such fact was upon the plaintiff. We think, therefore, that the appellant is without ground of complaint at this point.

VI. The doctors who attended the plaintiff were examined as witnesses in his behalf. They described the injury and the surgical operation which had been rendered necessary thereby. There was a fracture of the

6. EVIDENCE:
future disability: expert
opinion on
probability:
reasonable
certainty.

skull upon the top of the head and a surgical operation which removed a part of the skull bone and some of the brain tissue. They testified in effect that there could never be a complete recovery from the condition thus described. Neither the bone nor the excised brain tissue could ever be replaced. Dr. Welch testified also as follows, over the objection of the defendants:

"The probable effect will be that this man will continue in a state of nervous and physical debility, more than likely

to become epileptic and possibly insane or demented. . . . The chances, according to statistics, is about five per cent. I mean 20 out of 100 who sustain such injuries become subject to epilepsy, insanity or some form of dementia."

Similar testimony was given by Dr. Jepson. The objection to this testimony is now urged upon our attention. The ground of objection is that the evidence only went to the "probable" effect, whereas the jury could allow compensation only for such future disability as was reasonably certain.

Manifestly, the criterion contended for by the appellant is the proper rule to lay before the jury. Such was the rule given by the trial court. It does not follow, however, that the testimony of a physician must respond to this language to be rendered admissible. The physician, as a witness, was required to go no further in his statement than his candid opinion would warrant. The question of what disability the plaintiff was reasonably certain to suffer in the future still remained as the final question for the jury in the light of all the testimony in the case. No complaint is made of the form of the instruction to the jury at this point. We only hold, therefore, that the testimony complained of was admissible. There is the further consideration here that the verdict actually rendered was a very moderate one in the light of the testimony. If, therefore, the testimony complained of were technically objectionable, it would appear to have been quite nonprejudicial.

The foregoing comprise the principal questions presented for our consideration. We find no error in the record. The record as a whole impresses us with the fairness of the trial. The injury to the plaintiff was severe. The verdict is moderate. The liability of the defendants is almost conclusive under the evidence. The judgment of the lower court is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

PLATT PRESSED & FIRE BRICK COMPANY, Appellant, v. THE
INCORPORATED TOWN OF VAN METER, Appellee.

MUNICIPAL CORPORATIONS: Severance of Territory—Wishes of

- 1 **People—Sanitary and Police Needs.** In an application for the severance of territory from an incorporated city or town (Sec. 622 et seq., Code 1897), material considerations are (a) the wishes of the people and the benefits, if any, enjoyed by them by being within the incorporation, (b) whether the purpose of holding the property within the incorporation is solely to derive taxes thereon, and (c) whether the territory is reasonably needed for the future growth of the city or town and for sanitary and police purposes. *Held*, a refusal to sever was justified.

PRINCIPLE APPLIED: Application to have land severed from a small town which had remained stationary in population for 25 years or more. There was but little occasion for more building lots. Two separate creeks, subject to unhealthful overflow, touched or flowed through the land sought to be severed, the overflow at times reaching some of the streets of the town. Brick kilns, the gases from which were at times offensive, and sidetracks occupy part of the land in question. Disorderly and indecent laborers sometimes occupied bunk cars for considerable periods of time, and tramps not infrequently loitered around the kilns. Sunday ball games, unlawful by ordinance, were at times played on the land in question. Those asking a severance derived some advantage from sidewalks and lights. A much frequented public road was half in the town and half in the territory sought to be severed. *Held*, a severance was properly denied.

APPEAL AND ERROR: Municipal Corporations—Severance of Ter-

- 2 **ritory—Trial to Court—Effect of Finding.** The judgment of the trial court that certain territory ought not to be severed from the municipal corporation will be given the force and effect of a jury finding, and must stand as a finality unless abuse of discretion is shown.

Appeal from Dallas District Court.—HON. J. H. APPLIGATE,
Judge.

FRIDAY, JUNE 18, 1915.

ACTION at law brought by the appellant to sever territory from the incorporated town of Van Meter. A jury was waived and the cause tried to the court. The court dismissed the plaintiff's petition and the plaintiff appeals.—*Affirmed.*

Bert B. Welty and Dingwell & Clark, for appellant.

White & Clarke, for appellee.

PRESTON, J.—The only question is as to whether, under the law and the evidence in the case, the plaintiff was entitled to have its land, which is included in the defendant corporation, severed therefrom, and this involves the proposition as to whether the court was justified under the evidence in finding that the territory sought to be severed was necessary for the future growth of the town, or that it was necessary that it have jurisdiction of it for sanitary and police purposes.

1. MUNICIPAL
CORPORATIONS:
severance of
territory;
wishes of
people; sani-
tary and
police needs.

The population of the defendant town is three hundred eighty-six, and has remained substantially stationary for the last twenty-five or thirty years. It is said by appellant that the town was so quiet that one resident attempted to purchase a lot close to a church so his wife could see some activity. Appellee concedes that the town was not suffering from any particular boom, but it contends that the evidence shows there was comparatively no property available for residence purposes within the limits of the old corporation. Of course, plaintiff could not be compelled to sell any of its property for residence purposes. The appellant says there were fifty-six vacant lots suitable for residences, but appellee says that most of the residence properties in the town have more than one lot used in connection with the residences for barns, gardens, orchards, etc. We shall not go into the evidence further on this proposition, but content ourselves with saying

that if the only question was whether the town required the lands of appellant for residential purposes, or for the future growth of the town, we should be inclined to reverse.

But there are other questions more important and they are, as before stated, whether it was necessary that the town have jurisdiction of this territory for sanitary and police purposes. As to these questions, it is not so much what we would find were we the triers of fact, but whether the trial court abused its legal discretion in refusing to sever plaintiff's property. The case being at law, the judgment of the trial court upon the facts has the effect of the verdict of a jury.

As said in *Monk v. Town of George*, 86 Iowa 315, the question for us to determine is not whether, on the evidence submitted, we should have reached the conclusion which the trial court did, but whether an abuse of the legal discretion with which it is vested is shown.

It is said by appellant that, where there is an abuse of discretion, the court will set aside the findings of the trial court or trial jury, and this is the rule. *Ashley v. Town*, 71 Iowa 466, 468.

In the same case, and other cases, it has been said that "The wishes of the owners, while entitled to some weight, are not controlling, and the ultimate questions are: Is the territory reasonably needed in anticipation of the future growth of the town? It is important that the territory be retained for sanitary purposes, or that the town have jurisdiction thereover for the purpose of policing the same? It is quite important that a town retain control over territory upon which any considerable number of people reside in close proximity to the main business or residential section in order that it may exercise its police powers thereover. . . . Of course, if there be no other purpose in holding the territory than to derive an income therefrom by way of taxation, the land should be relieved of this burden. *Evans v. City*, 65

2. APPEAL AND
ERROR: municipal corporations: severance of territory: trial to court: effect of finding.

Iowa 239. On the other hand, the applicant should not be allowed to get out simply to escape taxation. If the territory is reasonably needed for any of the purposes above suggested, the owners thereof should pay their just proportion of the public burdens." *Johnson v. Town of Forest City*, 129 Iowa 51.

As bearing upon this point and the other questions, see: *Hanson v. Cresco*, 132 Iowa 533; *In re Town of Le Roy*, 135 Iowa 563; *Peek v. City of Waterloo*, 138 Iowa 650; *Christ v. Webster City*, 105 Iowa 119; *Johnson v. Town of Forest City*, *supra*.

In our opinion, the evidence does not show that the purpose of the defendant town in seeking to retain the property owned by plaintiff was only to derive an income therefrom by taxation.

It is said by appellant that there have been no wars or disturbances on the Platt land and no necessity for peace officers patrolling it.

We shall refer to some of the facts which are established, or which the court could have so found, bearing upon the question as to whether it was proper to retain this territory for sanitary or police purposes. The plaintiff's property is west of and adjoins an addition or two to the original town. Its kilns and ovens are near the corporate limits. The railroad is north of the town, coming in from the northwest, and passes or crosses plaintiff's property near the ovens. South of the town is a creek or two crossing a part of plaintiff's property. The town is located upon bottom land upon the south bank of the Raccoon River. The creek at the south and west at different seasons overflows the surrounding low land extending up and overflowing the south ends of portions of the lots in one of the additions to the town and the south ends of some of the lots in the original town. At these seasons, rubbish, bodies of dead animals and refuse are carried down and deposited along this creek, and this overflow is in close proximity to the town on the south side. There is

another creek that comes down from the west, draining the high portions of the Platt land and other land which strikes the east line of the Platt land on the south end of Main Street. From this point, it turns north and runs practically along the line of the old corporation along the east line of appellant's land. At times, the flow of water through this creek is so great that it overflows its banks and overflows the streets of the town. This creek does not discharge into and is not connected with the creek running south of the town, and it is contended by defendant that it is necessary that defendant town should have control of the creeks near the town and be able to control the flow of water and drainage for the purpose of sanitation and for the protection of the streets and alleys of the town against overflow from the creeks.

Plaintiff is and has been for some years maintaining a brick and tile plant just west of the old limits of the town. The buildings are about one hundred fifty feet west of the old town line. The kiln buildings are a short distance west and north of the other buildings. The most westerly of these kiln buildings is from two to three hundred feet west of the west corporation line. Some twenty-five or thirty men are employed about plaintiff's plant; several families live in the residence buildings upon the grounds; the kilns are operated day and night. Occasionally tramps are found sleeping and loitering about the kilns in the cooler weather. Two tracks extend south from the railway to the kilns, upon which cars are frequently left standing, and sometimes bunk cars, with Mexican laborers quartered therein, are left there for considerable periods of time. There is testimony that some of these laborers occupying these cars were disorderly and were given to indecent exposures, and there has been complaint of the citizens on account of this. The city had sought to control the placing and maintenance of these cars. A portion of plaintiff's grounds just west of the original town has been used as a ball park, on which Sunday games of ball have been played. The playing of baseball is pro-

hibited by the ordinances of the town. At some seasons of the year, the gases from plaintiff's plant are offensive to people living in the west part of town.

We think the trial court was justified in concluding that the location of the plaintiff's grounds is such that the exercise of police jurisdiction over them is desirable, and that it was necessary to retain such territory for sanitary purposes.

One or two other circumstances may be mentioned as bearing upon this point. The plaintiff's grounds are so located that they or the people living on them enjoy some benefit from the electric lighting of the streets of appellee along the west line of the town, and enjoy the benefits of its sidewalks leading up to its grounds. These benefits are enjoyed to some extent by the appellant's officers and employees, some of whom live in the town of Van Meter. The public highway running south of the old corporation line was one half within the corporation and one half on the territory sought to be severed. This highway is a part of what is known as the White Pole Road and is much used by motor vehicles, other vehicles and foot passengers. As stated, the town is small and not increasing in population. The evidence is not very strong, perhaps, and yet we think there was no abuse of discretion in the trial court in refusing to sever plaintiff's property. The judgment is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

THE STATE OF IOWA, Appellee, v. HARRY RAYBURN, Appellant.

PROSTITUTION, HOUSE OF: "Resorting to for Lewdness"—Who

- 1 **May Be Guilty—Male Person.** A male person may be guilty of resorting to a house of ill fame for the purpose of lewdness, within the meaning of Sec. 4943, Code 1897. Said section punishes both the act of resorting to a house of ill fame (a) "for the purpose of prostitution" and (b) "for the purpose of lewdness." "Prostitution" and "lewdness" are not synonymous terms within the meaning of said section.

WORDS AND PHRASES: "Prostitution"—"Lewdness"—Criminal
 2 Statute. The terms "prostitution" and "lewdness" are not synonymous terms within the meaning of Sec. 4943, Code 1897, punishing the act of resorting to a house for the purpose of prostitution or lewdness. (Sec. 48, Par. 2, Code 1897.)

PROSTITUTION, HOUSE OF: Resorting to—Intent—Gist of Of-
 3 fense. The gist of the offense of *resorting to* a house of ill fame for the purpose of lewdness, within the meaning of Sec. 4943, Code 1897, is the *purpose* or *intent* in so resorting. The offense may be complete without the occurrence of any specific acts of lewdness.

PROSTITUTION, HOUSE OF: Resorting to—Indictment—Suffi-
 4 ciency. An indictment for resorting to a house of ill fame for the purpose of lewdness, under Sec. 4943, Code 1897, need not allege the various acts which the defendant purposed committing.

Appeal from Wayne District Court.—HON. H. K. EVANS,
 Judge.

FRIDAY, JUNE 18, 1915.

THE defendant was charged with resorting to a house of ill fame for the purpose of lewdness. He was convicted by a jury, and judgment pronounced. From this judgment he appeals.—*Affirmed.*

K. E. Sallman and *Miles & Steele*, for appellant.

George Cosson, Attorney General, and *John Fletcher*, Assistant Attorney General, for appellee.

PRESTON, J.—The indictment is in this form:

"The Grand Jury of the County of Wayne, in the name and by the authority of the State of Iowa, accuse Harry Rayburn of the crime of resorting to a house of ill fame for the purpose of lewdness, committed as follows: The said Harry Rayburn, on or about the 28th day of September, in the year of our Lord one thousand nine hundred and fourteen, in the county aforesaid, did then and there wilfully, unlawfully and feloniously resort to

1. PROSTITUTION,
 HOUSE OF:
 "resorting to
 for lewdness":
 who may be
 guilty: male
 person.

and use, for the purpose of lewdness, a certain house of ill fame kept by Ollie Witt, said house of ill fame being then and there situated in the County of Wayne and the State of Iowa, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Iowa."

It was admitted of record that the defendant is a male person. Defendant was tried to a jury and found guilty, but no part of the evidence is set out in the abstract. The abstract recites that the testimony of witnesses was largely taken on the part of the State and of the defendant, but appellant omits the same for the reason that none of the testimony is necessary or material to any of the issues and questions raised. The instructions are not before us. At all stages of the trial, first by demurrer to the indictment, and later by a motion to direct a verdict for the defendant, motion to set aside the verdict, and motion in arrest of judgment, the defendant contended, substantially, that the words "any person" in Sec. 4943 of the Code, under which the indictment was found, did not apply to and include a male person, but only included a female person; also on the ground that the indictment did not take any specific act of lewdness for which it was alleged that the defendant resorted to and used said house of ill fame. The trial court ruled against the defendant on these propositions.

1. Sec. 4943 of the Code reads:

"If any person, for the purpose of prostitution or lewdness, resorts to, uses, occupies or inhabits any house of ill fame or place kept for such purpose, or if any person be found at any hotel, boarding house, cigar store or other place, leading a life of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years."

It is contended by appellant, and it is conceded by the State, that a man may not be guilty of prostitution. The

indictment in this case does not charge defendant with resorting to a house of ill fame for the purpose of prostitution, but does charge that he resorted to the place for the purpose of lewdness. But it is said by defendant that the words prostitution or lewdness in the statute are synonymous, and that the word "person" refers only to a female person; that a male person cannot be guilty of prostitution, or resorting to a house of ill fame for that purpose.

If "prostitution" and "lewdness" are synonymous, it would have been unnecessary to use but one of the words. There was presumably some reason for using both. The

2. WORDS AND

PHRASES:
"prostitution":
"lewdness":
criminal
statute.

statute reads that, if "any person," for the purpose of prostitution or lewdness, resorts, etc. If a man and woman go together to or resort to a house of ill fame for the purpose of having sexual intercourse, her purpose would be for prostitution, his for lewdness. Or a man could go by himself for the purpose of having sexual intercourse, which would be lewdness under this statute and under definitions hereafter given. Or a man could resort to such a place and be guilty of lewdness without sexual intercourse. Lewdness may not import criminal indulgence, but is generally used as indicating gross indecency with respect to the sexual relations. *State v. Mitchell*, 149 Iowa 362, 366. Sexual intercourse would, of course, constitute lewdness; but, as suggested, there may be lewdness without sexual intercourse at all, and the man, as well as the woman, may be guilty of it. We think the statute broad enough to cover situations such as those suggested. The purpose of the legislature was to suppress such conduct and reach both parties. We think the statute fairly and reasonably bears that construction. The words "any person" include all persons. Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning

in law, shall be construed according to such meaning. Code Sec. 48, Par. 2.

In the case we have supposed as to an act of sexual intercourse between a man and woman, it would not be sufficient, under some circumstances, or other provisions of the statute, to show the one act. But, under the section of the statute now under consideration, proof of one act would be enough, or the evidence might be such as that the crime would be complete without proof of such single act if the evidence was sufficient to show the intent or purpose in resorting to the place and that it was for the purpose of prostitution or lewdness.

In *State v. McDavitt*, 140 Iowa 342, the court said:

“We have also held that to establish the charge of resorting to a house of ill fame for the purpose of prostitution or lewdness, only one such act need be shown.”

In that case the indictment was under the second form of Sec. 4943, which provides, in substance, that if any person be found at any hotel, etc., leading a life of prostitution or lewdness, etc. In that case, as in this, the indictment charged that the defendant did resort to and use for the purpose of lewdness. In that case the court instructed that if defendant did resort to, use and occupy the hotel described for the purpose of lewdness, he was leading a life of lewdness at such hotel within the statute. This was held to be error. The court said:

“No doubt a person might lead a life of lewdness at a hotel by habitually resorting there for lewd purposes, or by repeatedly indulging in lewdness while living there, but no such conduct is charged in the indictment or indicated by the evidence.”

Appellant contends for that case that the words “only one such act” in the first quotation just given show that

both words, "prostitution" and "lewdness," refer to one and the same act. But we think this does not necessarily follow. The court was not construing any question of prostitution in that case. Under Sec. 4943, under which this defendant was indicted, it is not the act itself of sexual intercourse, or other lewdness, which is prohibited, but the resorting to a house of ill fame for the purpose of prostitution or lewdness. As indicating the purpose of the legislature in enacting the statute in question, we may refer to one or two others. Sec. 4938 provides a penalty for lewdly and viciously associating and cohabiting if unmarried. The word "lewdly" as there used has a meaning separate and distinct from its meaning when used in connection with the indecent exposure of the person. Under that section, the cohabitation or association must, to some extent, become notorious and reach that degree where it becomes observed by the public before a conviction is proper. Sec. 4939 punishes anyone who keeps a house of ill fame resorted to for the purpose of prostitution or lewdness. The situation had not yet been entirely covered. Persons who should visit a house of ill fame for the purposes for which it was established were not reached by either of the preceding sections. Sec. 4943 was evidently enacted to cover the last situation, and made resorting to a house of ill fame for the purpose for which it is maintained a crime. Either sex may resort to a house kept for that purpose, and either sex may commit lewd acts in such a place.

In *State v. Wilson*, 124 Iowa 265, where the charge was keeping a house of ill fame, this court approved an instruction defining "a house resorted to for the purpose of prostitution and lewdness" as being "a house visited by persons of both sexes for the purpose of having sexual intercourse, or some other lewd purpose."

In *State v. Mitchell*, 149 Iowa 362, 365, an instruction defining lewdness as "the unlawful indulgence of the animal

desires" was held inadequate and misleading as applied to the facts in that case. The indictment in that case was for conspiracy to induce two girls to commit the crime of lewdness, under Sec. 4938 of the Code, and the inquiry was whether the design of the defendants was that the girls lewdly and viciously associate with them, or other males. The holding was that this would not be established by showing a conspiracy to procure them to yield their persons to a single act of incontinence, but the design must have been to cause or induce each girl to lewdly or viciously associate or cohabit for some time with one of the defendants or other male person. The court refers to the *Wilson* case and Sec. 4939 of the Code, and says:

"The gist of the offense under that section is the keeping of the place for the purpose defined, and the term 'lewdness,' as therein found, is employed in its ordinary sense as meaning lustfulness, lecherous, lascivious, or libidinous conduct."

2. Appellant's next contention is that the indictment is insufficient, in that there is not set out the specific acts which the defendant is charged with having committed. The

4. PROSTITUTION,
HOUSE OF: re-
sorting to:
indictment:
sufficiency.

gist of the offense is resorting to a house of ill fame for prostitution or lewdness. The indictment charges that the defendant did then and there, wilfully, unlawfully and feloniously, resort to and use for the purpose of lewdness, a certain house of ill fame kept by Ollie Witt. Defendant was informed that the offense for which he was placed on trial was resorting to the house of ill fame kept by Ollie Witt, also that he resorted there for an unlawful purpose, to wit, lewdness. The indictment would not have been sufficient had it stopped with the allegation that he resorted to a house of ill fame, because he might have gone there for a legitimate purpose; but when it charged him with going there for the purpose of lewdness, the crime was charged in the language of the statute, showing that his purpose was an unlawful one

and one which the statute punishes. Lewdness has a distinct meaning in law, and we think it was unnecessary to give in detail in the indictment the various acts which he purposed committing. The character of the place and the specific acts committed, or which he contemplated committing, were matters of evidence, and not of pleading. Unless it was shown by the evidence that defendant resorted to the place for the purpose charged, defendant could not be convicted. As before stated, the evidence is not before us, and we must assume that there was evidence to so show.

The burglary cases are somewhat analogous. There the gist of the offense is the breaking and entering, and it has been held that in an indictment for burglary it is not necessary to describe in technical language the crime intended to be committed. Thus it is sufficient to charge the intent as having been to commit a public offense, to wit, adultery. *State v. Mecum*, 95 Iowa 433. See also *State v. Jennings*, 79 Iowa 513. And in such a case the fact that the indictment charges two different intents does not render it bad. The crime may be established by the proof of one or all the intents alleged. That is a matter of evidence. So in conspiracy cases, the crime intended to be accomplished by the conspiracy need not be described in the indictment with the accuracy or detail which would be essential in an indictment for the commission of the offense itself. *State v. Soper*, 118 Iowa 1, 4; *State v. Madden*, 170 Iowa 230.

There is no error, and the judgment is—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

E. C. WINSOR & SON, Appellees, v. THE MUTUAL FIRE & TORNADO ASSOCIATION, Appellant.

APPEAL AND ERROR: Assignment of Error—Failure to Argue—

1 **Waiver.** Waiver is the penalty for failure to argue an assignment of error.

INSURANCE: Removal of Property from State—Effect—Mutual

- 2 **Policy.** A policy of insurance issued by a mutual insurance company, organized under the laws of Iowa, on property situated in Iowa, is not rendered invalid because, in the ordinary use of the property, it is temporarily removed to another state where loss occurs, no provision to the contrary appearing in the statutes, by-laws or policy.

INSURANCE: Location of Property—Removal During Ordinary Use

- 3 **—Loss.** Insurance on personal property follows and attaches thereto wherever it goes in the ordinary and usual use of such property, unless the policy otherwise expressly or impliedly restricts the locality of the loss.

PRINCIPLE APPLIED: The insured, at all times, resided at Laurens, Pocahontas County, Iowa, and was engaged in excavating drainage ditches wherever he might secure contracts. The policy in question covered twenty horses used in the business, which horses, when the policy was issued, were employed, with the knowledge of the insurer, on a ditch in Buena Vista County, Iowa. The insurer admitted that he knew the horses were to be used in different parts of Iowa, but denied knowledge of their contemplated use outside of Iowa. The insured took the horses temporarily to Missouri in the prosecution of his regular business, and loss there occurred. The policy did not expressly or impliedly restrict the locality of the loss. *Held*, the loss was collectible.

INSURANCE: Location of Property—Policy Issued Under Antici-

- 4 **pated Removal—Loss—Estoppel.** Notice and knowledge to the insurer at the time of the issuance of a policy of insurance that the property might, in its ordinary use, be removed temporarily to another state, followed by the acceptance of premiums, precludes the insurer from insisting on the invalidity of the policy by reason of such removal.

INSURANCE: Mortgage Incumbrance—Knowledge of Insurer—

- 5 **Levying Assessments—Estoppel.** An insurance company issuing a policy and demanding and receiving assessments thereon, all with knowledge of the existence of a mortgage on the property, will not be permitted to question the validity of the policy by reason of such mortgage.

INSURANCE: Mortgage on Insured Property—Knowledge of In-

- 6 **surer—New Mortgage for Balance of Same Debt.** A policy of insurance issued with knowledge of an existing mortgage on the

property is not rendered invalid by the subsequent execution of a new mortgage for a remaining balance of the same old debt.

INSURANCE: Increasing Hazard—Act Not Violative of Policy—

7 **Burden of Proof.** If the insured does some act *not violative* of the policy, the burden of proof is on the insurer to show that the hazard was increased. If the insured does something *violative* of the policy, the burden of proof is on him, the insured, to show that the hazard was not increased.

PRINCIPLE APPLIED: A policy contained no provision against removing the property from the state. In the course of its ordinary use, it was so removed and loss there occurred. *Held*, the insured was under no obligation to show that the hazard was not increased.

Appeal from Buena Vista District Court.—HON. D. F. COYLE, Judge.

FRIDAY, JUNE 18, 1915.

ACTION at law upon an insurance policy indemnifying the plaintiff against loss or injury to certain property by lightning. Verdict and judgment for plaintiff and defendant appeals.—*Affirmed.*

Ed P. Malmberg and Bailie & Edson, for appellant.

F. C. Gilchrist and Faville & Whitney, for appellee.

WEAVER, J.—On May 20, 1909, the defendant association issued its policy to the plaintiffs, insuring them against loss or damage by fire, lightning, tornadoes, cyclones and wind-storms for the period of five years, to the amount of \$2,000 upon the horses and mules of insured party, not to exceed \$150 on each animal. The plaintiffs' petition alleges that on April 7, 1913, while said policy was still in force, lightning struck the tent in which the insured animals were then being kept at or near the town of Nyhart in the state of Missouri, killing nine horses and injuring five others, to the loss and injury to plaintiffs in the aggregate sum of \$1,600, for which amount a recovery is demanded. In an amendment to the

petition, it is further alleged that, at the time the horses were insured, plaintiffs were engaged in business as contractors in the excavation and construction of drainage ditches and that such has continued to be their business; that they employed their horses in performing such work and kept them in or about a tent near where they were so employed. They aver that, at the time the insurance was taken out, the defendant's agent was informed of the foregoing facts and knew that the horses were then employed upon a job of ditching in Buena Vista county and would thereafter be used by the plaintiffs in doing other work of like character in Iowa and adjoining states; and that defendant consented to such use and knew thereof, and with such notice and knowledge, it has since, from time to time, collected assessments and premiums from plaintiffs in consideration of its policy of insurance.

Answering the petition, defendant admits that plaintiffs reside at Laurens in Pocahontas county, Iowa, admits issuing the policy sued upon and that it has collected and received premiums and assessments thereon. It admits the agency of the person taking the application for insurance and its knowledge that the horses were in Buena Vista county when insured, but denies any knowledge or notice that they were thereafter to be used in any other state than Iowa. For a further answer, it is alleged that the defendant is a mutual association organized under the laws of Iowa and is without power to insure property outside of the state, and if the policy is construed as covering the plaintiffs' horses in Missouri, it is *ultra vires* and void. Still further answering, it is pleaded that, by removal of the horses to Missouri, the hazard of loss and injury was materially increased without notice to the association, and the policy thereby rendered void. By an amendment to the answer, it is further alleged that, in applying for the insurance, plaintiffs falsely represented that the insured property was free from incumbrance, when in fact the horses were then subject to the lien of a chattel

mortgage and that other and additional mortgage liens were thereafter placed upon said property by the plaintiffs without notice to and without the consent of the association, whereby the policy became void.

Replying to the answer, plaintiffs reassert that the policy was issued with notice and direct reference to the fact that the horses were then being used and were thereafter to be used in carrying on the business of Winsor & Son wherever they might obtain contracts in their line of employment, and that, with knowledge of such facts and conditions, the association has continued to recognize the validity of such policy and continued to levy and demand payment of assessments thereon at divers times down to a date since the commencement of this action, and by so doing has waived the right, if any it ever had, to deny its liability on the policy or to defend against plaintiffs' demand for payment thereof. They further allege that, at the time the policy was issued, they resided and have ever since had their home at Laurens, in Pocahontas county, Iowa; that their absence and employment in Missouri was temporary only, with the purpose, when their contract there was completed, to return with their horses to their said home in Iowa where their said property was always kept, except when temporarily employed elsewhere. Referring to the charge of false statements in the application for insurance, the reply denies the same and avers that the application was made and the policy issued with knowledge on the part of the association and its agent that there was a chattel mortgage outstanding upon the horses. This mortgage indebtedness, it is alleged, was thereafter largely reduced and the subsequent mortgages mentioned in the answer secured only the unpaid remnant of said indebtedness and served to decrease the hazard and risk created by the original incumbrance. Plaintiff further says that, with knowledge of all these facts, the association has continued to make and collect assessments upon the policy, thereby waiving its right, if any it had, to plead or urge a defense to this action on that

ground. The reply also pleads that the association did not attach a copy of the application to the policy, as required by law, and cannot, therefore, plead or prove the alleged false representations. These issues were tried to a jury, which returned a verdict for plaintiff, and from the judgment entered thereon, the defendant appeals.

The appellant submits its case relying upon the following propositions: First, that the removal of the property from Iowa to Missouri increased the risk or hazard to such an extent as to avoid the policy; second, that the association was without any authority to carry any risk outside of the state of Iowa, and therefore the removal of the property to Missouri rendered the insurance void; third, that the policy was rendered void by the incumbrance existing on the property when the contract was made; and fourth, that the policy was in any event rendered void by the giving of a subsequent mortgage. These points we will consider in the order stated.

I. The point that the taking of the horses to Missouri operated to increase the risk, and thereby avoided the policy, though stated in their premises, is not argued by counsel, and we therefore treat it as having been abandoned. We cannot say, as a matter of law, that the danger of a horse being struck by lightning is any greater in Missouri than in Iowa. Moreover, as we shall note in a subsequent paragraph, there was no burden on plaintiffs to negative an increase of risk.

II. The defense most thoroughly argued and relied upon seems to be that the association is one organized under the law of this state and is without authority to carry insurance upon property in another state, and that even though the policy sued upon might be enforced had the property remained in this jurisdiction until the loss occurred, it became of no validity when plaintiffs took the horses into Mis-

1. APPEAL AND
ERROR: assign-
ment of er-
ror: failure to
argue:
waiver.

2. INSURANCE:
removal of
property from
state: effect:
mutual com-
pany policy.

souri for the temporary purpose of performing a contract there.

In support of this position, we are cited to chapter 5 of title 9 of the Code, and especially to Sec. 1759-n of the Supplement of 1907, and to a section of the by-laws of the association. A reading of the statute develops nowhere any provision expressly limiting the authority of mutual insurance associations in the manner contended for. The by-law relied upon is to the effect that the principal place of business of the association is at Newton in Jasper county, but the territory in which it may effect insurance shall embrace the entire state. This, at the utmost, limits the territory in which insurance may be written; but it by no means follows that a valid policy written in Iowa upon property in Iowa becomes

void the moment it crosses the line into another state. The contract was an Iowa contract upon property in Iowa and enforceable in the courts of this state. There is nothing in our insurance act which restricts the authority of the appellant to the insuring of live stock only while it is found or kept on the owner's premises. The association might perhaps have so limited its own liability by an appropriate provision in its contract, but it was not required to do so. Indeed, the insurance of movable property, and especially such as teams employed in a service which may or frequently does take them away from the owner's premises for greater or less periods of time, would be of little value if closely restricted as to location, and few owners would go to the expense of procuring insurance if they understood that their indemnity was of that very incomplete and imperfect character. The well-settled rule in such cases is that, if the policy does not by express or clearly implied terms restrict the insurer's liability to loss occurring upon the owner's premises, the insurance follows and attaches to the property wherever it goes, so long as it is being put to uses such as are usual and ordinary with property of that nature and description; and

3. INSURANCE:
location of
property: re-
moval during
ordinary use:
loss.

this is the more emphatically true where the property when insured is, with the knowledge of the insurer, being used and employed in a business which necessitates its being kept for considerable periods of time at places other than the premises of the owner. *Kinney v. Ins. Co.*, 159 Iowa 490; *Wood's Insurance* (2nd Ed.) 47; *McCluer v. Ins. Co.*, 43 Iowa 349; *Longueville v. Ins. Co.*, 51 Iowa 553; *Mills v. Ins. Co.*, 37 Iowa 400; *Peterson v. Ins. Co.*, 24 Iowa 494; *Lathers v. Ins. Co.*, 135 Wis. 431; *Noyes v. Ins. Co.*, 64 Wis. 415; *Eddy v. Ins. Co.*, 46 N. Y. Supp. 695.

The rule as laid down by Mr. Wood, *supra*, is as follows:

"In the absence of special restriction clothed in clear and unequivocal language, as to the territory within which the property was to be insured, it will be deemed to have been within the contemplation of the parties that the property might be used in the ordinary way, and, considering the nature of the property, that the insurance would continue to attach wherever the same may be while the owner is using his property in the ordinary manner, and for the purposes for which such property is ordinarily held and used."

Even where the policy insures movable property which is described as being in a certain place or upon a certain farm or in a certain building, this court has frequently held that, in the absence of other restrictive words, the description of place is merely a matter of identification of the thing insured, and that its removal from the place for appropriate and temporary use does not affect the indemnity. In the *Peterson case*, *supra*, where the policy describes the property as being upon a certain section or farm, we said:

"Such limitation would be unreasonable. In effecting this insurance and paying the company for the risk it assumed, it cannot be supposed that the plaintiff was to be deprived, upon peril of forfeiture of his policy, of the ordinary and beneficial use of the property insured."

In the *Longueville* case the property (clothing) was described as "contained in" a certain dwelling, and the loss was incurred upon the public highway at a distance from the dwelling. In holding the company liable, we said that the reference to the dwelling was a matter of "description of the property insured, indicating the place of deposit when not in ordinary use. The character of the property insured must be considered in determining the true construction of the policy."

In the very recent case of *Kinney v. Ins. Co.*, 159 Iowa 490, 494, the live stock insured had been removed from the place described in the policy for the temporary purpose of pasturage at another place, and there the loss occurred. The articles of the association in that case expressly restricted its authority to "the insurance of live stock while on the farm in the possession or employ of the owner or his tenants"; yet we held, after a review of the authorities, that this provision is "for the purpose only of identifying the property covered by the policy. There is no provision in the policy that the property insured shall not be removed from the premises during the continuance of the policy, and no provision that removal from the premises will render the policy inoperative." We further said, in that connection, "from the very nature of the property, it was apparent that it was not contemplated by either party to the contract that the property should remain permanently on the place designated in the policy."

In the *McCluer* case, *supra*, the insurance was upon a horse and carriage "contained in" a certain barn and it was held that this amounted to no more than a statement that the "carriage when not in use was kept in the barn described as the ordinary place of deposit," and that the presumption is that property of that nature is "in use and that the policy is issued with reference to such use."

In this case, neither the agent nor the association could reasonably suppose or assume that the plaintiffs were owning

and keeping twenty horses to be retained permanently or continually in the town of Laurens. Indeed, it is admitted that, at the very moment when the insurance was taken, the horses were in another county; that they were being used in the performance of a ditching contract; and that the agent was expressly informed that the same kind of work was to be carried on in other places. His only denial in this respect is that anything was said about the possibility of plaintiffs' doing such work in another state. Upon these admissions of fact and under the rule of the cited cases, it must be held that the policy in suit was issued with reference to the ordinary use or work in which the property was being employed, and that the moving of the horses from place to place in pursuit of such employment was not a violation of any express or implied term of the contract. Certainly this is true as long as plaintiffs retained their home or domicile at Laurens, returning there and keeping the horses there whenever not temporarily engaged elsewhere in their line of work.

No other serious question arises upon this branch of the case, except upon the objection raised by the defendant that the taking of the horses into Missouri operated of itself to forfeit the insurance. No provision of the statute or of the articles or by-laws of the association or of the policy itself inhibits the taking of insured movable property temporarily into another state. Granting that the defendant's authority to do insurance business was limited to this state, the issuance of this policy was strictly within its power. The making of the contract, as we have already noted, was in all respects

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|-----------------|--|
| 4. INSURANCE: | an Iowa transaction, and the insurance is |
| location of | made none the less Iowa insurance because |
| property: | |
| policy issued | we hold that the indemnity so provided at- |
| under antici- | tached to and followed the property in a |
| pated removal: | temporary excursion across the state line. |
| loss: estoppel. | |

Moreover, the evidence in this case would justify the finding that express notice was given the agent at the time that the plaintiffs' work was liable to extend at times into other states,

and the policy was issued with that knowledge. That an association doing business in a restricted territory may consent to the removal of the insured property beyond the limits of such territory without forfeiting the indemnity has recently been decided: *Kesler v. Association*, 160 Iowa 374. So also in *Marden v. Ins. Co.*, 85 Iowa 584, an Iowa insurance company having no authority to do business in Nebraska issued a policy upon property situated in the latter state. Loss having occurred, the company was held liable on the theory that, although the property was in Nebraska, the contract was made in Iowa to be performed in that state, and the fact that the company was prohibited from doing business in Nebraska was no defense to an action brought in this state to recover the indemnity. The act of the plaintiffs in taking the horses temporarily to Missouri was a lawful one; it was not prohibited by any stipulation of the contract and cannot be held to affect the liability of the defendant.

The conclusions stated in this paragraph are not in the least inconsistent with the decisions of this court cited by the defendant. In *Lakings v. Ins. Co.*, 94 Iowa 476, which is largely relied upon by counsel, the court expressly reaffirms the doctrine of the Peterson and other cases which we now follow, but did not there apply it for the very sufficient reason that the policy there in suit in express words insured the property "while on the premises only." In *Dryer v. Ins. Co.*, 94 Iowa 471, the language of the policy is not quoted, but it was taken as conceded that it covered the property "only when on the premises described." But even there it was held that if the soliciting agent, knowing that the owner desired insurance which would permit the property to be moved, filled out the application for a policy of restricted insurance only, without the applicant's knowledge or consent, the company might be estopped to deny liability.

Whatever may be said as to decisions by the courts of a few other states on the question here discussed, this court is thoroughly committed to the rule which we here apply,

and its essential justice is too apparent for controversy. The policy sued upon is not void for want of authority to issue it, nor was the insurance forfeited by the removal of the property from place to place in the usual course of the owner's business.

The situation is not rendered any stronger for the defense by the provision of the by-laws that, when the property shall be removed from the building in which it was originally insured, consent may be obtained therefor from the secretary, or by the further advice to the policy holders that "when you sell your property or change your location or post office, the secretary should be notified at once." The property was not originally insured in a building and there was no change of the owner's location or post-office address. The home of the parties at all times remained at Laurens, where they regularly returned and kept the horses when their contract work was completed.

III. The jury were also justified in finding that the insurance was granted with express notice of the existence of a mortgage which covered the horses and the rest of the owner's outfit for their special work. They

5. INSURANCE:
mortgage incumbrance:
knowledge of insurer: levying assessments:
estoppel.

were also justified in finding that the subsequent mortgages were given in renewal of an unpaid balance of the same mortgage debt without any increase of the burden of incumbrance.

Having with such notice issued the policy, and having thereafter repeatedly acknowledged its validity by making and collecting assessments thereon, the defendant will not be

6. INSURANCE:
mortgage on insured property: knowledge of insurer: new mortgage for balance of same debt.

allowed to make such incumbrance a shield against liability for the loss. There is no dispute upon the further fact that the mortgage debt was paid in part before the loss and that the subsequent mortgages secured only the same debt as thus reduced. The

burden of proving these alleged facts was by the court placed upon the plaintiffs, and the jury have found the issue in

their favor and the verdict must be sustained. Supporting this conclusion, see *Greenlee v. Ins. Co.*, 102 Iowa 427, 432; Wood on Insurance, (2nd Ed.) Sec. 245; *Collins v. Mutual Co.*, 95 Iowa 540, 543; *McKibban v. Ins. Co.*, 114 Iowa 41; *Kister v. Ins. Co.*, 128 Pa. 553; *Mowry v. Ins. Co.*, 64 Hun 137; *Farmers Ins. Co. v. Newman*, 78 N. W. (Neb.) 933.

IV. It is argued that there is a burden upon plaintiffs to show that the taking of the horses into Missouri did not increase the hazard of loss. Such is not the rule. It is true

that, under our statute and decisions, the burden is on the insured person who has violated any of the terms or conditions of the contract to show that such act or omission did not contribute to the loss; but it is well settled that a defense based upon an increase of hazard is an affirmative one, and the burden of proof is on the insurer to prove the increase and not upon the insured to negative it. Code, Sec. 1743; *Adams v. Ins. Co.*, 135 Iowa 299; *Greenlee v. Ins. Co.*, 102 Iowa 427, 432; *Kinney v. Ins. Co.*, 159 Iowa 490, 497.

As we hold that plaintiff did not violate any provisions of the contract by the use he made of the horses, he was under no burden to negative an increase of risk.

V. No objections to the instructions given by the court or to the rulings upon the admission of evidence have been argued by counsel and it is quite doubtful whether, taking the charge to the jury to be the law of the case, as in strictness we ought, some of the main questions we have discussed are properly before us. We have chosen, however, to consider the case upon its merits and find them to fairly sustain the judgment below.

In so far as the record is undisputed, it discloses no reason why the defendant should not perform its contract of insurance, and in so far as there is any conflict in the testimony, the finding of the jury in plaintiffs' favor is conclusive

7. INSURANCE:
increasing haz-
ard: act not
violative of
policy: burden
of proof.

upon the court. No reason appears for interfering with the judgment of the district court and it is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

W. C. ZELLMER, Appellee, v. STEPHEN McTAIGUE, Appellant.

EVIDENCE: Opinion—What Is Not—Whether Two Objects Met.

- 1 Whether two passing objects hit each other is a statement of fact by a witness in position to see, and not an opinion.

PRINCIPLE APPLIED: An automobile passed a team. Plaintiff claimed the automobile hit one of his horses and injured it. A witness in a position to see was refused permission to state whether or not the automobile hit the horse. *Held*, error; also that if the witness was not in the best position to see, his opinion whether the automobile hit the horse was admissible for what it was worth.

DAMAGES: Injury to Property—Cost of Repairs—Reasonable Value

- 2 **Thereof.** Cost of repairs is not the measure of recovery for a wrongful injury to property. Such cost must be shown to be the reasonable value of the repairs, especially when there is no evidence as to the nature of the injury to the property.

HIGHWAYS: Laws of the Road—Instruction Without Support in

- 3 **Evidence.** An instruction having no support in the evidence should not be given. So held with reference to a collision on the public highway.

PRINCIPLE APPLIED: Plaintiff was overtaken on the public highway and turned his team to the right and entirely outside of the traveled path. Defendant, without leaving the traveled path, drove his automobile past plaintiff's team and, according to plaintiff's claim, hit the team, or at least frightened it, and caused it to run away, with resulting damages. The court instructed as to defendant's liability under the statute (Sec. 1569, Sup. Code, 1913) if, in passing, he turned back into the road within 30 feet of the team and such turning back was the proximate cause of the accident. *Held*, error, because having no support in the evidence.

APPEAL AND ERROR: Quotient Verdicts—Instructions Against—
4 **Discretion of Court.** Instructions cautioning the jury against
“quotient” verdicts held unobjectionable.

Appeal from Guthrie District Court.—HON. LORIN N. HAYS,
Judge.

FRIDAY, JUNE 18, 1915.

ACTION to recover damages for the killing of one of plaintiff's horses, for injuries to another, and to a wagon and harness, due to the alleged negligence of defendant in carelessly driving his automobile so close to the horses that they became frightened and ran away. There was a denial of all negligence on defendant's part, and on the issues thus tendered, the case was tried to a jury, resulting in a verdict for the plaintiff for the sum of \$300.00, and defendant appeals.
—*Reversed.*

Carl P. Knox and Lynch & Byers, for appellant.

A. M. Fagan and Milligan and Moore, for appellee.

DEEMER, C. J.—Plaintiff intrusted his team and wagon to a young woman eighteen years of age, who was accustomed to handling horses, to drive the same from his market place to his home in the country, some two or three miles distant. This young woman had been working both inside plaintiff's home and out of doors, occasionally in the fields, and the implication is that she was a strong and rugged girl.

The team, in so far as plaintiff knew, was gentle and safe, and there is nothing amounting to affirmative proof that the wagon was not in condition. The wagon had two boxes upon it, and on top of the upper one there was a spring seat upon which the driver was seated. The lower box was half full of lumber. Plaintiff lived southwest from the town of Casey, and when the woman who was driving the team homeward had reached a point some two miles west of the town, she came to a crossroad leading south toward plaintiff's home;

and just as she was turning the corner to go south, or about that time, an automobile passed her, going either west or south. This auto did not frighten her team, but having turned the corner and gone a short distance south, she heard another automobile coming, and to let it pass, she drove to the west side of the north and south highway, entirely outside the beaten path, and there either stopped or slowed down her team to allow the machine to go by.

At that time, another team was coming from the south; and as it approached plaintiff's team, it started to turn out of the road, and as it got nearly to where plaintiff's team was, enough space was left between the two teams so that defendant drove his automobile between them. The driver of the northbound team signaled defendant to stop or slow down, but whether he did so or not is a matter of sharp dispute. Some of the witnesses testified that he drove through practically between the teams at a high rate of speed, and that the machine either struck one of the plaintiff's horses or was driven so close to it as to frighten it, thus causing the team to run away and to do the injury and damage complained of.

Other testimony was adduced to the effect that, upon signal, defendant brought his machine practically to a stop; that, with the consent of the man driving the northbound team, he (defendant) speeded up his car, went by plaintiff's team without frightening it, and passed to his destination, oblivious of the fact that plaintiff's team had thereafter been frightened and had run away, doing the damage complained of.

There can be no doubt, under the record, that the woman driving plaintiff's team went entirely out of the beaten track and off onto the grass at the west side of the highway, and that the team was there stopped for the purpose of allowing defendant's auto to pass, and that she gave no signal to stop or slow down; and there is no testimony that the team became frightened until the auto was directly abreast of the

team, or until it struck one of the horses, as one of plaintiff's witnesses testified.

So that one of the material questions in the case was whether or not the machine struck one of the horses. Defendant produced a witness who was in an adjoining field and he was asked as to whether or not the automobile struck either of the horses. He answered that he did not think it did. The answer was stricken as being a conclusion of the witness. He was then asked to state as a fact whether the machine struck either horse, but was not permitted to answer. These rulings were erroneous. The witness was in a position to see, and whether or not the automobile struck either of the horses was a fact and not an opinion, to which the witness might properly have testified. Indeed, even if his point of view were not the best, his belief as to whether the team was struck by the machine was a proper matter of inquiry, the weight of it being for the jury. It was not such an opinion as the law regards incompetent, because a mere conclusion of the witness. The matter could not otherwise be brought before the jury; for, as a rule, the only means of telling whether or not one object strikes another is by observation, and the belief of one as to whether or not there has been an actual collision is the only method whereby to arrive at the ultimate fact. *Scrimgeour v. Chase*, 145 Iowa 368, 372.

II. Without any description of the nature and kind of injury done to the plaintiff's wagon and harness, he was permitted to testify over objection as to what he paid for repairing the same. The fact that he was put to expense and that he paid, or became obligated to pay, was doubtless a material inquiry; but his measure of recovery was not what he paid or was charged, but the reasonable and proper charges for such repairs as were necessitated by reason of the injury to the property. The court instructed that he

1. EVIDENCE:
opinion : what
is not :
whether two
objects met.

2. DAMAGES :
injury to prop-
erty : cost of
repairs :
reasonable
value thereof.

might recover fair and reasonable damages for the injury done; but aside from the testimony just referred to, there was no proof as to what these were.

While we would not reverse on this ground alone, we call attention to the matter in order that it may be corrected on a re-trial. The following authorities hold that such testimony is erroneous or not sufficient to justify such an instruction as was here given. *Carnego v. Coal Co.*, 164 Iowa 552; *Elzig v. Bales*, 135 Iowa 208.

III. The trial court gave the following among the instructions:

“Seventh—The statute provides that when a person in a vehicle shall approach another from the rear upon the public highway and desires to pass, it shall be the duty of the driver or operator of such vehicle ahead to give up half of the beaten path thereof, upon proper signal or request, by turning to the right. The vehicle approaching from the rear shall turn to the left, and shall not return to such road or path within less than thirty feet of the team or vehicle which has been passed; provided, however, that such vehicle need not give such right of way when it would jeopardize the safety of the driver or operator to do so.

“Testimony has been introduced upon the trial of this case tending to show that defendant in passing the team of plaintiff at the point of the accident turned into the road so near to the plaintiff’s team that his auto struck one of plaintiff’s horses, or came so near to the horse as to greatly frighten it and thereby cause the injury complained of. Should you find from the preponderance of the testimony that defendant at the time of the alleged accident was attempting to pass plaintiff’s team on the highway, and you find that the driver of plaintiff’s team had given the half of the beaten track by turning to the right, and you further find that the defendant returned to the track within thirty feet from plain-

8. HIGHWAYS:
law of the
road: instruction without
support in
evidence.

tiff's team and so close as to touch said team or so close to it as to frighten it, and that the accident complained of was the proximate result of such close proximity to plaintiff's team, then and in such case defendant would be guilty of negligence in the operation of his said car, and if you further find that such negligence was the direct and proximate cause of the injury, then and in such case plaintiff would be entitled to recover of defendant such damages as the evidence satisfied you as reasonable men he has sustained, and which are the proximate results of such negligence, if you find defendant was negligent. The burden is upon plaintiff to establish these facts by a preponderance of the testimony before he will be entitled to recover upon this ground in the operation of his car."

As already observed, there was no testimony to support this instruction. The driver of plaintiff's team had driven entirely out of the beaten track into the highway, and was waiting for defendant to pass with his machine. At no time did defendant drive out of the beaten path; and at no time, according to the testimony, did he return to the road in front of plaintiff's team. The statute to which reference was made in the instructions had no application to the case, and it should not have been given.

IV. The trial court, doubtless out of an abundance of caution, gave an instruction defining quotient verdicts, and warned the jury against adopting that method of fixing the damage. It was correct in law, and although somewhat unusual, we do not see how any prejudice resulted or could result to either party. Defendant's counsel say that it was an invitation to the jury to return a verdict for plaintiff, but we are not impressed with the argument.

There may have been some reason for giving it in this particular case, and such instructions, as a rule, lie within the sound discretion of the trial court. No abuse of that dis-

4. APPEAL AND
ERROR: quo-
tient ver-
dicts: instruc-
tions against:
discretion of
court.

cretion appears here; but for the errors pointed out, the judgment must be, and it is,—*Reversed*.

WEAVER, EVANS and PRESTON, JJ., concur.

MARGARET A. FRISBEE, Appellant, v. THE HAWKEYE LAND
COMPANY et al., Appellees.

NEGLIGENCE: Known Defect in Street—Attempt to Pass Over—

- 1 **Contributory Negligence.** Contributory negligence *per se* will not be pronounced on the mere act of passing over a *known* defect in a public street. The test is: Did the traveler know or ought he to have known that it was *imprudent* to so pass? Couched in other terms: As a reasonably prudent person, did I believe and have a right to believe that I could pass in safety?

PRINCIPLE APPLIED: Glenn avenue, a public street, ran east and west. It was intersected at right angles by the Sergeant Bluff road. An adjoining landowner cut a new road across Glenn avenue, connecting it with the Bluff road. This new road was cut below the level of Glenn avenue, leaving a bank. A barrier was placed across the traveled part of Glenn avenue near the bank. South of the barrier, the Glenn avenue bank was spaded down for a few feet, to furnish access to the new road. Plaintiff used these streets in going to church. She and others had passed that way several times during the progress of the work, and without accident. On the day in question, she avoided the obstruction in the morning by driving around it. She returned at night, going west on Glenn avenue. There were no lights. Near the barrier, she was told, by someone supposed to be connected with the grading, to go to the south of the barrier. She did so, the buggy dropped forward into the new road, she was thrown out and injured. *Held*, not guilty of contributory negligence *per se*.

MASTER AND SERVANT: Respondent Superior—Independent Con-

- 2 **tractor—Who Is Not.** One hired by a landowner to grade a street under the direction of the owner's engineer, and at a certain price per yard, is not an independent contractor.

MUNICIPAL CORPORATIONS: Defective Streets—Notice of Con-

- 3 **dition.** When the work of constructing a new road across a

public street had been in progress during several days in succession, a jury might well find that the city ought to have known of the resulting conditions and remedied the same.

Appeal from Woodbury District Court.—HON. GEORGE JEPSON, Judge.

SATURDAY, JUNE 19, 1915.

THE opinion sufficiently states the case.—*Reversed.*

Harding & Oliver, for appellant.

Milchrist & Scott, for appellee, Hawkeye Land Company.

E. P. Farr and *W. V. Steuteville*, for appellee, C. F. Betz.

Schmidt & Pike and *Sam Page*, for appellee, Sioux City.

WEAVER, J.—Glenn avenue is a public street in Sioux City extending east and west until it intersects with the Sergeant Bluff road, another street which runs substantially north and south. The Hawkeye Land Company undertook to improve a plat north and east of this intersection, in the course of which work it constructed a road or new street crossing Glenn avenue and continuing at an angle which brought the new way into connection with the Sergeant Bluff road at a point somewhat farther south. The plaintiff lives to the south of the place here described, and in going to the city and to church has been accustomed to drive over the streets we have named. In carrying the new street across Glenn avenue, the land company made a cut which was of sufficient dimensions to interfere quite materially for the time being with the travel upon the avenue. The excavation was being done by Betz, who had been hired by the land company to do that work under the directions of the company's engineer at a specified price per yard. On the day in question, the plaintiff, who is a woman 64 years of age, drove to church and, on reaching the place where this work was in progress,

avoided the cut by driving around through the field on the north side. Night came on before her return and her son was driving the horse. There was a barrier erected across the traveled path of the avenue. On reaching the barrier, or immediately before, a person, who plaintiff thinks was Betz, called to them and told them to take the south side where it appears that the defendants or some of them had spaded down a few feet of the bank of the cut to permit of its being crossed. Turning to the south past the end of the barrier, they drove along or near the south line of the street when, in the darkness, one or more of the wheels went over the embankment into the excavation, which had been extended across the avenue as above described, whereby plaintiff was thrown out and injured. She brings this action for the recovery of damages, alleging that her injury was caused by the negligence of the defendants in failing to put up proper barriers, or to display warning lights for the prevention of such accidents. The defendants each denied all charges of negligence and alleged that plaintiff by her own want of care contributed to the injury of which she complains. At the close of the testimony on plaintiff's part, defendants severally moved for a directed verdict in their favor, on the ground that the testimony conclusively shows plaintiff to be chargeable with contributory negligence, and on the further ground that there is no evidence on which the charge of negligence by the defendants can be sustained. The motion was sustained, a directed verdict was returned for the defendants and judgment entered thereon, from which rulings and judgment this appeal has been taken.

From the fact that the motion for directed verdict was sustained as to all of the defendants, it is quite apparent that the ruling was based on the first ground assigned, that the plaintiff was conclusively shown to have contributed to her injury by her own negligence; and this is the point which is chiefly relied upon by appellees in argument.

I. In our judgment, the record does not show contributory

negligence by the plaintiff as a matter of law, and the issue should have been submitted to the jury. It is true that plain-

tiff knew of the excavation in the street. She had passed that way several times during the week and saw the work in progress, but she had on each occasion been able to pass without accident. Others had also driven through

there. The barrier erected against travel was across the traveled track, at which point the excavation was deepest, leaving open the way on either side thereof, thus rendering it practicable for the travel on the avenue to turn to the right or left and find a way across the cut where it was more shallow. Plaintiff had the right to travel the street by day or by night and, finding the way obstructed, she could properly go around the obstruction, unless the danger of injury was so great and so evident that, as a person of ordinary sense and caution, she ought to have known it was imprudent to undertake it. The leaving of the way open at either end of the barrier, with knowledge that the public was using the opportunity thus afforded, may not have been as a matter of law an invitation to travelers to continue such use; but it must have been apparent that the existence of such conditions would naturally lead such travelers to believe that they could make the crossing in that way with safety. Plaintiff had gone through in safety several times, and as she approached the place on this last occasion, she was told by one whom she understood to be connected with the work to take the south side of the cut, and in endeavoring to do so, in the darkness, fell into the excavation. While she knew that the street was more or less broken up by the work which was being done there, and that in the absence of care there was liability to accident, yet this did not require her to wait till morning before attempting to pass, or to turn back and seek some more distant route to her home if, as a reasonably prudent person, she believed she could safely follow the course indicated by Betz. Whether she could so reasonably believe depends

1. NEGLIGENCE:
known defect
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over: con-
tributory
negligence.

upon a consideration of all the circumstances and presents a question upon which fair-minded men could readily reach different conclusions, and for this reason it is not to be disposed of as a matter of law. Even though Betz may have had no authority to act in the premises, or even if plaintiff was mistaken in believing him to be the person who directed her to drive upon the south side, yet the fact, if it be a fact, that she was so directed by someone whom she believed authorized to speak, or by someone on whom she relied as being better informed than herself concerning the condition of the passage around the obstruction in the street, has a legitimate bearing upon the issue of contributory negligence, and the jury could properly consider it as tending to show reasonable care on her part.

Whether the testimony makes a case in which the negligence, if any, of plaintiff's son would be imputed to her, we neither consider nor decide; for even if we should hold with appellees upon that proposition, we still think the case was one for the jury. Quite in point in principle upon the question of contributory negligence of a person who undertakes to pass over a public way which he knows to be in a defective condition is the case of *Fountain v. Des Moines*, 164 Iowa 316, with the precedents there cited.

It follows from what we have said that the court erred in holding the plaintiff chargeable with contributory negligence as a matter of law.

II. Nor have we any doubt that the evidence was sufficient to take the case to the jury upon the issue of negligence by the defendants. The jury could have properly found

2. MASTER AND SERVANT: respondent superior: independent contractor: who is not.

that the defendant land company was directly responsible for the tearing up of Glenn avenue at this point, and none the less so because (as its manager testifies) it "hired Betz to do the grading at so much per yard."

The fact that "Betz was hired to do the grading" on a yard-age instead of a per diem basis does not of itself make him

any less the servant of the company, nor relieve it of its legal duty to exercise care for the safety of persons lawfully traveling such highway. So far as the city is concerned, the evidence tends to show that the work of excavating the avenue had been going on for several days in

3. MUNICIPAL
CORPORATIONS:
defective
streets:
notice of
condition.

succession, and it was for the jury to say whether, in the exercise of its duty in the premises, the city ought not to have known of the conditions thus created in time to have remedied them before the plaintiff's injury. But it is argued that the accident occurred outside the street limits and there can be no liability of the city for an injury so occurring. How far, if at all, a city which permits the obstruction of one of its streets and thereby compels or induces the public to pass over adjacent property in order to get around the obstruction may be held liable for injuries sustained by a traveler while outside of the street boundary, we need not undertake here to decide. The evidence shows that Glenn avenue was not fenced on the south side at this point; and, while there is testimony to the effect that the plaintiff's horse and carriage at the time of the accident was a little beyond the street line, there is also testimony to the effect that they were "on the line" and that the "accident occurred in Glenn avenue"; so that even if the appellees' contention that there would be no liability for an injury received outside the street limits be accepted as correct, there was still evidence on which the jury could find that the injury was received within the street. The motion for a directed verdict should have been overruled.

For the reasons stated, the judgment below will be reversed and cause remanded to the district court for a new trial.—*Reversed.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

IOWA MAUSOLEUM COMPANY, Appellee, v. T. B. WRIGHT,
Appellant.

APPEAL AND ERROR: Directed Verdict—Motion for—Failure to

- 1 **Renew—Waiver.** He who moves for directed verdict before the close of all the evidence in the case, suffers an adverse ruling and fails to renew the motion at the close of all the evidence, waives any possible error in the former ruling.

FRAUDS, STATUTE OF: Sale of Real Estate—Crypt in Mausoleum

- 2 **—Documentary Evidence.** Assuming that the sale of a crypt in a mausoleum is a sale of real estate, *held* that the documentary writings sufficient to satisfy the statute of frauds were furnished (a) by the written contract, (b) by the written specifications, (c) by the written report of the engineers thereon, (d) by the written correspondence in reference thereto signed by the defendant, followed by the construction of the crypt in accordance with said specifications.

CONTRACTS: Signing—Conflict of Evidence—Record Not Show-

- 3 **ing.** Where the signing of a certain letter was material to defendant's liability on his former contract, *held* that the record presented no conflict as to defendant's signature, one witness testifying that he saw defendant sign said letter, defendant testifying that the signature looked like his signature, but he had no remembrance of signing it.

CONTRACTS: Repudiation—Repentance. One who enters into a

- 4 written contract, subsequently repudiates the same, and still later enters into negotiations with the other party and insists on certain changes, which are granted, and the contract completed in accordance therewith, has no defense to the entire contract price—can no longer insist on his attempted repudiation. So held in regard to the building of a mausoleum.

Appeal from Shenandoah Superior Court.—HON. GEO. H.
CASTLE, Judge.

SATURDAY, JUNE 19, 1915.

ACTION upon a contract. Directed verdict for plaintiff. Defendant appeals.—*Affirmed*.

Frederick Fischer and *Roy E. Havens*, for appellant.

Earl R. Ferguson and *C. R. Barnes*, for appellee.

Per Curiam.—The action is upon the following contract:

EXHIBIT "A"

The Iowa Mausoleum Company, Waterloo, Iowa.
Price of Compartments \$150.00 each.

Shenandoah, Iowa, Nov. 16, 1910.

I, T. B. Wright, hereby subscribe for four compartments in the GRAND COMPARTMENT MAUSOLEUM to be constructed in the City of Shenandoah, Iowa, according to the plans drawn by the Iowa Mausoleum Company, on file at Ferguson's office for which I agree to pay the Iowa Mausoleum Company, or order, the sum of Six hundred Dollars as follows: One-third when foundations are in; one-third when walls and compartments are constructed to the square, and balance when roof is on and all work is completed. It is further agreed that above company will give a deed for the compartments herein subscribed when payment is made in full and building is dedicated. Payable at First National Bank, Shenandoah, Iowa.

T. B. Wright.

The Iowa Mausoleum Company,
By C. L. Langley, Special Representative.

Thereafter the defendant sent to the plaintiff the following letter:

Shenandoah, Iowa, July 24, 1911.

Iowa Mausoleum Company, Waterloo, Iowa. Dear Sirs: November 16th, 1910, I subscribed for four compartments conditionally in a mausoleum to be erected in Shenandoah,

Iowa, on the verbal representations of your Mr. Langley. Recent investigation has revealed the fact that the building is to be built quite different from what I was led to expect and will not be a permanent and lasting building that one must be in order to have any value when it is to be used for such a purpose. For reasons given above I wish to withdraw my contract and will ask you to kindly cancel the same and return said contract to me at once. Respectfully,

T. B. Wright.

On the same day, but after the letter by defendant, as we understand it,—though the record is not clear as to this,—a committee of crypt holders, of which the defendant was a member, wrote to the plaintiff as follows:

EXHIBIT "B"

(Omitting letter head.)

Shenandoah, Iowa, July 24, 1911.

Iowa Mausoleum Company, Waterloo, Iowa. Gentlemen:—On the 19th inst., your engineer, Mr. J. B. Balcomb, was in Shenandoah and called a meeting of the compartment or crypt holders in the mausoleum you are to build here in Shenandoah. The crypt holders insisted on being fully informed as to the plans and specifications for the proposed building, and asked that a committee from their number be allowed to inspect the plans and specifications and submit them to some competent engineer for his approval. Your Mr. Balcomb consented to this and the undersigned committee was appointed and the plans and specifications so far as Mr. Balcomb had the same were turned over to this committee. This committee selected a well known firm of consulting engineers and submitted the plans and specifications that had been turned over to it to the engineers. We have just received their report and are enclosing a copy herewith except that we are not giving the names of the engineers, preferring for the present to withhold the names. You will note that the engineers in their report state that no specifications what-

ever were turned over to them and that they cannot make a full and complete report without full and complete plans and specifications. This committee turned over to the engineers everything they had received from your Mr. Balcomb, and supposed that they had the full and complete specifications and plans. The report of the engineers is virtually useless the way it stands, as you will admit.

We wish you would send us immediately the complete plans and specifications and all the data called for in the report of the engineers. As soon as we receive the full and complete plans and specifications we will turn them over to our engineer and get a report just as soon as possible. We feel sure that you do not want any delay in this matter and we certainly are anxious to have the information as soon as we can. Your Mr. Balcomb promised that no work would be begun on the mausoleum until our committee could consult an engineer, get his report and submit the report to the crypt holders. Of course you will admit that this is only fair. We mention this as we do not want any work commenced until we can get a full and complete report from our engineers and submit it to the crypt holders.

Trusting that we may hear from you with the proper plans and specifications at an early date, we are, very truly yours,

(Signed)

J. J. Cardwell,
T. B. Wright,
A. W. Murphy.

The plaintiff did not consent to the attempted rescission of the contract by defendant, but on July 26, 1911, in response to defendant's letter of the 24th, first above set out, in which plaintiff expressed surprise at the contents of defendant's letter, stated that they expected to build the mausoleum in accordance with the agreement, and stating that they realized that influences had been at work adverse to the plaintiff and that an attempt had been made to injure it wherever possible by misrepresenting the facts; but that they expected to abide

by the terms of the agreement and expected the purchasers to do the same.

On July 19, 1911, there was a meeting of the crypt holders, at which defendant was present, and he participated in the proceedings. The plans were discussed and questions were asked of the representative of the plaintiff company, who stated that the original plans had proved defective in some instances and that he had a better plan. At this meeting, the plaintiff's engineer was asked if he cared if the plans were examined by someone else, and he said there would be no objection. Thereupon, the names of the defendant, Mr. Cardwell and Mr. Murphy were suggested as a committee. It is shown that at this meeting the matter was thoroughly discussed regarding the building. The plans were submitted to architects at Omaha, Nebraska, who made two reports. In the last one, they suggested certain changes, and stated:

"The mausoleum constructed as planned and specified will be a credit to your city, and will endure for centuries, but rigid inspection is absolutely essential to achieve this result."

The mausoleum in question was built in accordance with the plans as modified and suggested by the Omaha architects, and we are satisfied from the record that there was a substantial compliance therewith, and this was done without any further objection from the defendant. There is no evidence that the building as erected will not be a permanent and lasting building, as defendant claimed in his letter of the 24th it would be.

1. At the close of plaintiff's testimony, defendant moved for a directed verdict in his favor, which was overruled.

1. **APPEAL AND ERROR:** directed verdict: motion for: failure to renew: waiver.

Thereupon he introduced his testimony. It is now argued that the court erred in overruling this motion. But the motion was not renewed at the close of all the testimony.

Under such circumstances, we do not review the assignment based upon such ruling.

2. It is thought by appellant that the sale of a crypt is a sale of real estate and that, unless in writing, is within the statute of frauds. Without determining the question as to

2. FRAUDS, STATUTE OF: sale of real estate: crypt in mausoleum: documentary evidence.

whether such a contract is one for the creation for the transfer of an interest in land, we think the plaintiff's case was proven by documentary evidence. This documentary evidence shows this situation: Plaintiff and

defendant entered into a written contract, as claimed by plaintiff. On July 19th, there was a meeting of the crypt holders, at which a committee was appointed, consisting of defendant and two others. The plans, which were present at that meeting, were turned over to this committee, one of whom took them to engineers at Omaha. These engineers wrote a report in which they asked for fuller specifications. This report was forwarded to plaintiff, with a letter signed by defendant, requesting full specifications in compliance with the request of the engineers. The plaintiff furnished the requisite data. From this, the engineers made a report, suggesting certain changes, and, in addition, made certain red marks upon the plans suggesting slight changes. These plans and specifications, together with the report of the engineers, were turned over to the plaintiff. The plaintiff built the mausoleum in conformity with the plans and specifications, as changed by the engineer selected by defendant and the other crypt holders. Such was the situation when plaintiff rested. The witnesses for defendant testified to substantially the same state of facts and at many points corroborated the testimony for plaintiff.

3. It is thought by defendant that there is a conflict in the testimony as to whether he signed the letter which purports to be signed by the committee. A witness for plaintiff

3. CONTRACTS: signing: conflict of evidence: record not showing.

testified that the signatures attached thereto are those of Cardwell, Murphy and defendant, T. B. Wright; that Mr. Wright signed it in his presence. The defendant himself was

called as a witness for plaintiff and said that the signature

"looks like my signature, Mr. Cardwell's signature and Mr. Murphy's signature. I have no recollection of signing the instrument and I do not remember the incident." This does not amount to a denial of the testimony of the witness who testifies that he saw defendant sign it, and there is no conflict at this point.

4. The real question in the case, we take it, is the effect of the letter of July 24th, by which the defendant attempted to rescind his contract. We have not been favored with citation of authority by either side on this point.

4. **CONTRACTS :**
repudiation :
repentance. No fraud was alleged or proven as ground for a rescission of the contract. Plaintiff has not sued for a breach of the contract, but to recover the contract price for performance of the contract by it.

In *Port Huron Machinery Co. v. Hurto*, 154 Iowa 435, in speaking of the right to recover upon a contract for the sale of personal property, the court, at page 437, said:

"The authorities generally are not agreed on the question whether there can be a recovery of the contract price where the contract is not fully executed by the transfer of title; but it is the general holding that the mere retention of possession by the vendor is not material. There may be a little confusion in our own cases on the question whether the retention of title by the vendor necessarily remits him to an action for damages alone, because of language used in one or two opinions. But we think an examination of the cases will show that, where the issue was directly involved, we have never held that in such cases there cannot be a recovery of the contract price; while, on the contrary, we have directly held that such recovery can be had, although neither title nor possession have passed to the vendee. In *McAlister v. Safley*, 65 Iowa 719, a written order for a granite monument was given to the plaintiff's assignors, Webster & Williams, by the defendant and accepted by said Webster & Williams. Before anything had been done by Webster & Williams to-

ward completing the monument or delivering it, the defendant notified them that she would not receive it, and requested them not to complete it. It was also shown that at the time the contract was entered into, Webster & Williams were the owners of the monument and had it in their possession, and that it was wholly completed except the cutting of the inscription that had been directed by the defendant. On the facts as above recited, this court said:

“‘On this state of facts, we think there can be no question of defendant’s liability for the contract price of the monument. It may be conceded that the contract was executory and that the property in the monument did not vest in defendant upon the execution and delivery of the written agreement. But neither of the parties reserved a right of rescission. Defendant’s undertaking to pay the stipulated price was contingent on the single condition that Webster & Williams would cut the inscription on the monument, deliver it at Traer, and set it up at the grave of her husband. She agreed absolutely that upon the happening of these conditions she would pay the price agreed upon at the stipulated time. There was no failure on their part to perform their undertaking. She, therefore, had no grounds for rescinding the contract.’

“‘The law will not permit one party to an agreement to terminate it at his pleasure, unless the right to do so is reserved in the contract itself.’”

Plaintiff did not consent to the attempted rescission, but insisted upon performance by defendant, and it performed its part and built the mausoleum according to the contract as modified by the defendant and his associates, the other crypt holders. We do not understand the parties to dispute the proposition that defendant’s letter of July 24th would have been a breach of the contract and that plaintiff could have sued for the breach. It did not do this, but was insisting all the time upon performance. In this case, no time was fixed

when the mausoleum should be completed or when the work should begin. Defendant's repudiation was before the time for the completion of the contract. The cases recognize the doctrine that where the repudiation is premature, and there is time for repentance or change of mind, and a withdrawal of the repudiation, the plaintiff would not be required to treat as final defendant's refusal to perform his part of the contract.

We think, under the evidence in this case, there was a change of mind on the part of defendant after his letter of July 24th. Thereafter, as one of the committee, he insisted upon certain concessions by plaintiff in the construction of the building. Changes in the plans were made, and thereafter plaintiff built the mausoleum in accordance with the plans as so changed, without further objection on the part of defendant. Under such circumstances, after the building is completed, defendant may not now rely upon his attempted repudiation of the contract. This is the ground on which we affirm.

In *Davis v. Bronson*, 16 L. R. A. 655, the question was discussed. That was a case where, defendant having refused to perform a contract for the erection of a creamery by plaintiffs before they had entered upon the performance thereof, it was held that an action to recover the contract price would not lie, although plaintiffs had, notwithstanding defendant's refusal to perform, completed the creamery according to contract; that the remedy was for damages for breach of the contract. But in that case, there was no evidence of the change of mind indicating a withdrawal of the objection by defendant to a performance of the contract. The cases cited in the opinion and note recognize the doctrine of repentance or change of mind.

Other errors are assigned, but defendant merely says in argument that, "While we will not discuss each of the errors assigned, it is not our intention to abandon any of them." We think the exhibits were properly admitted in evidence.

The points we have discussed determine the case. We think there was no error, and the judgment is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS, WEAVER and PRESTON, JJ., concur.

HENRY PETTERMANN, Appellee, v. THE CITY OF BURLINGTON,
Appellant.

NEGLIGENCE: Defective Sidewalk—Knowledge—Contributory Neg-

- 1 ligence. Mere knowledge of the existence of a defect in a sidewalk, followed by an attempt to pass thereover, does not charge one with contributory negligence *per se*. The material inquiry is: Did the injured person know it was *imprudent* to attempt to pass over the defect or did he believe he could pass in safety? If the former, recovery is denied. If the latter, the question of contributory negligence is for the jury.

TRIAL: Motion for Directed Verdict—Error in Ruling—Waiver.

- 2 Error, if any, in overruling a motion for directed verdict made before the close of all the evidence is waived when such motion is not renewed at the close of all the evidence.

MUNICIPAL CORPORATIONS: Defect in Sidewalk—Notice of—

- 3 Evidence—Form of Question. In an action for personal injury by reason of a sidewalk being out of repair, a question, "How long would you say generally the sidewalk had been out of repair?" was held to clearly call for the condition of the walk at the place where plaintiff was injured and as not being objectionable as calling for the condition at other or remote points.

TRIAL: Arguments Based on Complainant's Evidence—Objec-

- 4 tion Precluded. A party cannot well complain of an argument based on evidence brought out by the complaining party himself on cross-examination or permitted to remain in the record without objection.

DAMAGES: Future or Continuing Injury—Right to Recover—In-

- 5 struction Not Authorizing. Instruction reviewed and held not to authorize recovery for future or continuing injury.

APPEAL AND ERROR: Instructions—Failure to Object Before

- 6 Reading—Waiver. Failure to interpose an objection to an in-

struction before the same is read to the jury works a waiver of the right to object.

Appeal from Des Moines District Court.—HON. OSCAR HAILE, Judge.

SATURDAY, JUNE 19, 1915.

ACTION to recover for personal injuries. There was a trial to a jury and a verdict and judgment for plaintiff for \$500.00. Defendant appeals.—*Affirmed.*

Ben P. Poor, for appellant.

S. K. Tracy and Frank Thompson, for appellee.

PRESTON, J.—1. Plaintiff in his petition and amendment thereto states that defendant negligently and carelessly permitted and allowed water to collect and run across and stand upon a part of a wooden sidewalk on a public street in the city; that plaintiff, while walking over said walk, using ordinary care, without contributory negligence on his part, fell on such walk at such place by reason of stepping on a ridge or hump of ice formed across the walk, caused by water clogging and freezing at such place, thereby creating such ridge, and so negligently permitted by defendant to exist for many days prior to such injury; that by reason of such defect and danger in such walk, plaintiff was made to fall with great force, and he thereby received severe and permanent injuries to his head and brain, and that all of such injuries still continue and will remain permanent for years.

As appellant states it, the principal issues thus presented were: (1) Did the conditions complained of in fact exist? (2) Did the city have knowledge, actual or constructive, of their existence? (3) Was the plaintiff free from negligence contributing to his injury? (4) Was plaintiff hurt as alleged, and what was the extent of his injury, if any? As to all these questions we think the evidence is such that

it was a question for the jury, though as to some of them there is a conflict in the testimony.

As to the first proposition, plaintiff testified that the water from the roof of a house fronting on the street ran right across the sidewalk. "I fell at this spot, which was rough and lumpy. I fell because of the lumpy condition of the ice."

As to the second, there is testimony that the condition of the walk at this point had been the same for three or four weeks. Though plaintiff testified that he had passed over the

1. NEGLIGENCE :
defective side-
walk : knowl-
edge : con-
tributory
negligence.

place, he says he thought he could get across with safety by exercising care. It was after night, and he says he was not very well acquainted with the spot. In *Cook v. Town of*

Hedrick, 135 Iowa 23, and other like cases, it has been held that, although a walk is defective, a traveler has a right to pass over the same; and if he does so, it is generally a question for the jury to determine whether or not in so doing he was in the exercise of due care. Without going into the evidence in further detail, we think the question as to whether plaintiff was guilty of contributory negligence was for the jury, as was also the question as to whether plaintiff was hurt, as alleged, and the extent of his injury. Some of these questions are argued, but not included in the assignments of error.

2. The first assignment is that the court erred in overruling defendant's motion for a directed verdict. This motion was filed at the close of plaintiff's testimony. The motion was overruled, and the defendant did not stand on the ruling, but proceeded to introduce its testimony. The motion was not renewed at the close of all the evidence. The

2. TRIAL : motion
for directed
verdict : error
in ruling :
waiver.

holdings have been that under such circumstances defendant cannot complain of the ruling. *Finnane v. City of Perry*, 164 Iowa 171; *Hanson v. Kline*, 136 Iowa 101.

3. The next assignment is that the court erred in permitting plaintiff to testify, over objection, that the side-

walk had been out of repair generally for months before he was hurt. The thought is that this permitted the witness to testify that the walk along there was out of repair generally. But we think the question is not susceptible of such a construction. The question was, "How long would you say generally the sidewalk had been out of repair?" It is clear that the purport of the question was not to inquire as to the general condition of the walk, but how long, in a general way, it had been out of repair at the place where plaintiff was hurt, and to show constructive notice to the city.

3. MUNICIPAL CORPORATIONS: defects in sidewalk: notice of: evidence: form of question.

4. TRIAL: argument based on complainant's evidence: objection precluded.

4. The third assignment is that the court erred in overruling defendant's objection to the argument to the jury of plaintiff's attorney. In the closing argument, Mr. Tracy stated:

"Was it muddy in the street that night? Their witness, Mrs. Andrews, says it was a moist, misty night, sleeting. Didn't that make mud?"

The objection was that the court admitted the testimony for the purpose of showing and testing the recollection and memory of the witness, and not for the purpose of showing the conditions as they existed. Mrs. Andrews was a witness for the defendant. As to this witness, it is clear from the record that the evidence was properly admitted for the purpose of testing her recollection as an aid in fixing the date. The record shows:

Q. "How do you fix the time April 11th?" A. "I marked it down, and here it is (exhibiting paper)." Q. "What kind of a day was it on the day—on the evening he got hurt, was it cold or warm?" A. "It had sleeted in the morning." Q. "What kind of a day was it, cold or warm?" A. "Well, it wasn't severe cold; it was just medium." Q. "It was sleeting and wet?" A. "Yes, sir, that morning."

At this point, counsel for defendant objected as not cross-examination, but there was no motion to exclude the testimony. The objection was not timely. The court did say that it was admitted for the purpose of testing her recollection. But, aside from this, earlier in the trial, when the plaintiff, who was the first witness called, was on the stand, he testified, on cross-examination by counsel for defendant:

"It was misty and rainy all day and towards evening froze up." Q. "Misting rain all day on January 10th?" A. "Yes, sir."

So that the testimony on this point was drawn out by the defendant, and the evidence of Mrs. Andrews went in without objection. We are unable to see how there could be any prejudice to the defendant because of the circumstances just referred to.

5. The next assignment is that, in view of the wording of paragraph 3 of instruction 1, the court erred in giving instruction 15 to the jury. By instruction 1, the court simply stated the substance of the issues, that is, plaintiff's claim; that plaintiff states that all of such injuries will still continue and will be permanent or remain for years and that his ability to work and earn money has been greatly and permanently impaired. Instruction 15 follows:

5. DAMAGES:
future or continuing injury: right to recover: instruction not authorizing.

XV.

"If you find the plaintiff entitled to recover, he should be allowed fair and reasonable compensation for his injuries, if any. In estimating his damage, no precise rule can be given for the amount to be allowed as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment and be guided by the evidence in allowing him such sum as will reasonably compensate him. In making up this amount, if you find for the plaintiff, you

should consider the ability of the plaintiff to earn wages and perform labor prior to the alleged injury, as shown by the evidence, and also his ability to earn wages and perform labor since receiving the alleged injury, and award the reasonable value of the time lost because of the injury, and a fair compensation for the bodily pain and suffering caused by the said injury, if any."

The objection now made to the instruction is, as counsel for appellant state it, "The court erred in giving instruction 15 because there was no evidence of future injury to the plaintiff, and it does not exclude the allowing of damages for future injury; that it is error to submit to the jury a claim or issue when there is no evidence to support it." Defendant did not ask an instruction on this subject. We do not think the instruction authorizes a recovery for future damages. As to the objection that the instruction does not exclude the allowing of damages for future injury, it is sufficient to say that that question is not included in defendant's exceptions to the instructions before they were read to the jury. As to the other point, we think there is evidence as to future damages; that claim was made in the petition, and the court would have been justified in allowing a recovery therefor.

6. APPEAL AND
ERROR: IN-
structions:
failure to ob-
ject before
reading
waiver.

The plaintiff was injured in January, 1913, and the trial took place in December, 1913. Some of the evidence bearing on the extent of his injury will be referred to briefly. Plaintiff testified:

"I couldn't rest a minute and the pain continued over months. At night I can't sleep with my back of my head. I have pain in my head here so and have had since, and this pain in my shoulder still continues and swells up every night that I work, and I can't earn as much money as I did. My business was making mortar, carrying mortar and one thing

and another. I couldn't make a full hand, never since. I tried pretty hard; I couldn't do it."

Plaintiff's wife gave similar testimony, and there is some testimony tending to contradict this evidence. It appears then from the testimony, and the jury could have so found, that for nearly a year after plaintiff's injury, and up to the trial, he still suffered pain and sleeplessness from his injury, and this would justify the conclusion that it would exist in the future, at least for some time; so that, had the instruction authorized future damages, there would be support in the testimony. *Evans v. Elwood*, 123 Iowa 92, 96; *Cotant v. Boone Suburban*, 125 Iowa 46, 53. But as before stated, we think the instruction does not authorize recovery for future damages. The instruction is, therefore, more favorable to the defendant than it was entitled.

The fifth and last assignment is that the court erred in overruling defendant's motion for new trial, and erred in overruling each and every ground of said motion. This is somewhat general, but it includes points in regard to the question of plaintiff's contributory negligence and the extent of his injury and like questions which have been before noticed.

We discover no error in the record, and the judgment is, therefore,—*Affirmed*.

DEEMER, C. J., EVANS and WEAVER, JJ., concur.

KENNETH C. SEIBERT, JR., et al., Appellees, v. SYLVIA E. SEIBERT, Appellant.

ADOPTION: Execution by One Parent Only—"Separation"—Construction of Statute. The "separation" of the parents of a child which will legally authorize one of the parents having the care and custody of the child to alone execute legal adoption papers (Sec. 3251, Code 1897) need not necessarily be an abandonment, but must partake of the nature of an abandonment
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or a condition more or less permanent, and for some material length of time. A mere temporary separation is not sufficient.

PRINCIPLE APPLIED: The parents ceased to live together January 6, 1914. The wife left Des Moines and went to Kansas City. The child was with the husband. He wrote as to his condition, said she could see him any time and could take the baby to Kansas City. She returned to Des Moines March 21st. Had possession of the child several times each week. Later, possession of the child was denied her. Near this time, the husband asked her to return. About July 1st, she definitely determined to bring, and did bring, divorce action. Unbeknown to her, the husband had, on May 9th, executed adoption papers to his sister. *Held*, adoption papers illegal as against the wife.

ADOPTION: Separation of Parents—Cause of Separation—Material-
2 **ity.** Whether the "separation" of the parents of a child was so far permanent as to authorize one of the parents alone to execute adoption papers (Sec. 3251, Code 1897) may be materially determined by a consideration of the *causes* of the separation.

ADOPTION: Statutes Governing—Strict or Liberal Construction.
3 In the construction of statutes governing adoption papers, it is suggested that whether a strict or liberal construction will be employed depends materially on who is making the contest, a nonconsenting parent or the one adopting the child.

Appeal from Polk District Court.—HON. WM. H. MCHENRY,
Judge.

SATURDAY, JUNE 19, 1915.

THIS is a habeas corpus proceeding to test the validity of certain articles of adoption. The appellee, Edna Seibert, is the mother of Kenneth C. Seibert, Jr. Her husband, executed articles of adoption of the child to his sister, the defendant. Later, a divorce proceeding was instituted, and at the time of the trial of this case, the divorce proceeding had not been determined. The plaintiff alleged in her application for the writ that the child, four and one-half years of age, was restrained of his liberty by the defendant, the cause of said restraint being by virtue of certain articles of adoption signed

by the child's father to the defendant. The restraint of the child was alleged to be illegal, because the articles of adoption were a fraud against plaintiff's rights, and because the plaintiff had complete care, custody and control of said minor child prior to the filing of the application and left him with his father for the purpose of visiting him; that the mother had no knowledge or information of the articles of adoption. The answer of defendant denied the allegations of the petition and alleged that said articles of adoption were entered into by the defendant and the child's father at a time when the father and mother of said child were living separate and apart from one another, and while the father was in the lawful care of the child and providing for its wants. The trial court held that the articles of adoption were invalid. The defendant appeals.—*Affirmed.*

Franklin & Müller, for appellant.

Chester J. Eller and *C. N. Pickler*, for appellees.

PRESTON, J.—The question presented is the construction of Sec. 3251 in regard to adoption of children, which provides, substantially, that the consent of both parents must

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|---|---|
| 1. ADOPTION:
execution by
one parent
only: "separa-
tion"; con-
struction of
statute. | be given if they are living and not divorced or separated, and if they are divorced, separated or unmarried, the consent of the parent lawfully having the care and providing for the wants of the child. |
|---|---|

The only question in the case is whether, under the evidence, the parents were separated within the meaning of the statute, so that the husband could give the child for adoption to the defendant without the consent of the wife, who is the mother of the child. The evidence of Mrs. Seibert is that she left her husband January 6, 1914, and, as she claims, because of his abuse of her. She was gone a short time and returned to Des Moines from Kansas City. The articles of adoption are dated May 9, 1914. The trial of this case was had July

15, 1914, and Mrs. Seibert testifies that about two weeks before that date, she made up her mind to apply for a divorce. On the trial of this proceeding, Mrs. Seibert gave her testimony without objection, and during the examination of another witness, the question arose as to whether

2. ADOPTION:
separation of
parties: cause
of separation:
materiality.

the inquiry should include an investigation as to the cause of the separation and as to whether or not the mother was justified in leaving her home, her husband and the child. The court indicated that in his opinion it was not necessary to go into such matters. There was no objection to this by defendant and no offer to prove what the defendant's claim or contention was with reference thereto.

It appears to us that the court might well have received the testimony on this subject, if there was any and it had been offered, as to whether Mrs. Seibert left with or without cause; whether she was at fault or whether the husband was to blame; whether she was driven away by him, or whether she left for some improper purpose. These matters would have a bearing on the question of intent of the parties as to whether there was a separation. As stated, there was some evidence by Mrs. Seibert of ill treatment by her husband; but it was agreed, after the court had indicated his opinion on that question, that such evidence should not be considered in the determination of the case. In fairness to appellant, we do not consider her testimony on that point. We think it is not necessary to consider it in the determination of the case, because there is other evidence which we think may properly be considered, which shows that the separation of the parties was merely temporary. Mrs. Seibert was claiming that her husband had abused her, and this has a bearing on the question of the so-called separation, whether her claim was or was not well founded. Mrs. Seibert testifies:

"Mr. Seibert and I quit living together the 6th of January, 1914. I did not see the baby before I went to Kansas

City, but Mr. Seibert wrote me all the time telling me how he was and saying I could see him any time I came back and that I could take the baby to Kansas City with me. I got homesick for the baby and came back March 21st. I had the baby on Sunday all day and went to work on Tuesday morning. After that I took the baby home twice a week and sometimes three times and kept him over night, returning him to Mr. Seibert's sister in the morning. I never consented to Mr. Seibert's sister (defendant) having custody or control over the child superior to my own. Shortly after Easter Mr. Seibert refused to let me take the child. I did not know until the day the petition for writ of habeas corpus was filed that any articles of adoption had been instituted. . . . The reason I did not take him with me was that I had no place to put him. I have a divorce case pending. I went back home the next morning after I had left the night before to get my clothes and Mr. Seibert asked me to come back and live with him. I stayed in Des Moines about ten days before I went to Kansas City and did not see the child during that time. During those ten days I stayed with different friends. Mr. Seibert and I have been living separate and apart from one another, but it was not definitely settled that we were separated. We were living apart."

Q. "Now you were also living apart on the 9th day of May, 1914, were you not?"

A. "Not in the sense you would have me say, we were not. I made up my mind to get a divorce about two weeks ago."

In the opinion of the trial court, which appears in the record, he states that the statute means if these people were divorced and the custody given to one of them, or if they were separated and there was a lawful order giving the custody to one of those parents, that parent could enter into articles of adoption. Under either of these conditions, such parent could permit adoption, but such a construction is too narrow. Under

the wording of the statute itself, if the parties were divorced, then the consent of the parent lawfully having the care and providing for the wants of the child would be sufficient to authorize the entering into articles of adoption. We see no reason for not giving force to the word separated, and we think there is no reason why that word should not be construed in its ordinary meaning. If Mrs. Seibert had gone to Kansas City or California on a visit, she and her husband would have been separated in a sense, and yet clearly that is not what the statute means. On the other hand, suppose a husband with an affinity should abandon his home and family, leaving a sick wife, with several small children, the mother penniless; the husband is gone for a considerable time and his whereabouts are unknown; the children are suffering for want of food and clothing: could it be claimed for a moment that, under such circumstances, the parents would not be considered as separated, so that the wife could give the children, or some of them, for adoption to reputable and responsible persons who would supply their wants and give them an education? Under the circumstances just indicated, adoption statutes are favored. 1 R. C. L. 593, 594. If a husband and wife with, say, four children, quarrel; they separate for a time, not knowing just what they are going to do. Perhaps one or the other contemplates a divorce proceeding. Each of the parents takes two of the children. Pending the final determination of the parties as to what they shall do, and during such temporary separation, we think the parents could not each execute adoption papers for the two children in their charge. Or, if a man and wife quarrel and they separate, and one, say the wife, threatens a divorce, and that she will ask for the custody of the child, the other party might obtain possession of the child and might be conscious that he could not successfully resist the suit of his wife. The husband could not, while thus separated, for the purpose of defeating his wife's claim, give the child for adoption to another without the consent of the wife.

As stated, we think the testimony in this case shows that

the separation was a temporary matter. Mrs. Seibert claimed, whether true or not, that her husband had mistreated her, and yet the next morning he asked her to come back and live with him; she had not determined until about July 1, 1914, to commence a suit for divorce, and this was after the adoption papers, May 9, 1914. At the time of the adoption, the parties had not determined what would be done. It would not be necessary, in order that the parties should be considered as separated, that there should be an abandonment, but we think there must be something in the nature of an abandonment, or a condition that is more or less permanent and for some length of time. The statutes of some of the states use the word "abandoned" instead of "separated." Some refer to children who are abandoned, others to abandonment of children by the parent. Without referring further to the cases, see *Allison v. Bryan*, 30 L. R. A. (N. S.) 146, and note; 1 Corpus Juris, 1387, Sec. 76; 1 R. C. L. 608.

Some of the cases hold that the adoption statutes should be strictly construed; other cases hold that they are liberally construed. Some of them make a distinction between construction of the statute and a construction of the articles of adoption. We apprehend that an important matter to be considered on the question whether a strict or liberal construction should be given would be who is making the contest. There should, perhaps, be a strict construction where the parent who has not consented is questioning the legality of the adoption, but not necessarily so when the contest is by the person to whom the child is given for adoption. In the latter case, the act of adoption may have been consummated years before, and the right to inherit and other rights of the child should be considered. 1 R. C. L. 595.

Our conclusion is that the articles of adoption in this case are invalid as to the mother, because the parents were not separated within the meaning of the statute, and the father alone was not authorized to execute articles of adoption

8. ADOPTION:
statutes gov-
erning: strict
or liberal con-
struction.

to the defendant without the consent of the mother. The judgment of the district court is—*Affirmed*.

DEEMER, C. J., WEAVER and EVANS, JJ., concur.

DES MOINES UNION RAILWAY COMPANY, Complainant, v. DISTRICT COURT OF POLK COUNTY, Respondent.

JUDGMENTS: *Vacation—Passing of Term—Notice of Proceeding*
1 *to Vacate—Necessity for.* Power to set aside final judgments, after the term at which rendered, must be exercised strictly in accordance with statutory regulations. (Secs. 4091–4099, Code 1897.) Notice of the proceeding to set aside is jurisdictional.

PRINCIPLE APPLIED: An action at issue, after pending over two years, was dismissed by the court for want of prosecution. After another term of court had intervened, the court, on motion of plaintiff, set aside the judgment of dismissal and reinstated the action without any formal or written notice to the defendant. An exception by defendant was entered, but admittedly defendant did not appear and was not then represented by counsel. Minutes of the filing of the motion and of all subsequent orders relating thereto were published in the "Daily Record," which was, apparently, a private publication for public distribution. Counsel who appeared for the defendant prior to the dismissal were informed of the order vacating the judgment and reassigning the cause for trial. Later, the cause went to trial and judgment without appearance by defendant. *Held*, the court, (a) by the order of dismissal and (b) by the passing of the intervening term, wholly lost jurisdiction of the cause and, in order to legally set aside the dismissal, must reacquire jurisdiction of the defendant (1) by service or acceptance of formal written notice, or (2) by an appearance thereto by defendant.

JUDGMENTS: *Vacation—Jurisdictional Notice Required—Substituted Notice Not Recognized.* Jurisdiction to vacate a judgment, after the term has expired at which it was rendered, only attaches when the notice has been given and the service made in time, manner and form provided by law. Some other notice or service, assumptively "just as good," will not be recognized.

PRINCIPLE APPLIED: (See No. 1.) *Held*, the publication of a minute of the filing of the motion to set aside the judgment

of dismissal, and of the order thereon, and the verbal notice to the attorneys, did not satisfy the command of Sec. 4095 of the Code, 1897, that a certain notice should be given and a certain service made thereof.

DISMISSAL AND NONSUITE: Inherent Power of Court to Enter—

3 Failure to Prosecute—Time—Computation. An action may be dismissed for want of prosecution, under the inherent powers of the court. Assuming, in instant case, that notice of such contemplated action was necessary under a rule of court requiring ten days' publication of notice to precede the dismissal, *held*, notice published on June 10th, followed by an order of dismissal on June 20th, was sufficient because (a) furnishing ten days' notice by excluding date of publication and including date of dismissal (Sec. 48, Par. 23, Code 1897), and (b) if ten clear days were required by the rule, it was not a case of no notice but of defective notice only.

Appeal from Polk District Court.—HON. LAWRENCE DE GRAFF, Judge.

MONDAY, JUNE 21, 1915.

CERTIORARI to review certain proceedings had in the district court in a certain action in which W. T. Shaver was plaintiff and the complainant herein was defendant. The facts are stated in the opinion.—*Annulled.*

Parker, Parrish & Miller, for complainant.

A. P. Chamberlain and E. D. Smith, for respondent.

WEAVER, J.—A vehicle belonging to Shaver was injured in a collision with a locomotive belonging to the railway company, and he brought suit in the district court of Polk county to recover damages. Said action was begun for the January, 1911, term of the court, and the railway company appeared thereto and filed an answer, taking issue upon the material allegations of the petition. On June 10, 1913, considerably more than two years after issues joined in said cause, the court, in accordance with the practice prevailing therein, gave public notice that on June 20th and 21st, the calendar

would be called for the dismissal of cases liable to such disposition, the notice being published as was usual in that court in the Des Moines Daily Record, pursuant to a rule by which all cases remaining upon the calendar for more than three terms without trial were subject to summary disposition. On June 20, 1913, said cause was called and an entry made as follows: "It is hereby ordered that this case be and the same is hereby dismissed at plaintiff's costs." So far as shown, neither party was present, or, if present, neither made any objection to the order. Some six months later and after another term of court had intervened, a motion was filed by the plaintiff therein to reinstate the cause; but no notice thereof was served upon the railway company or its counsel, though a minute of its filing was published in the Daily Record. On January 17, 1914, a ruling was entered sustaining the motion and ordering a reinstatement of the case. An exception by the company was also noted in the calendar, but it is conceded that it did not appear to such motion and was not there represented by counsel. A minute of this order was also published in the Daily Record. Thereafter, Shaver, by his counsel, filed trial notices in this cause for the January, March, May, September, and November, 1914, terms of court, but no court action was taken thereon until, at the January, 1915, term, it was assigned for trial on January 20th. It was again assigned at the March term, and on March 24, 1915, having been reached in its order, was called for trial, and the railway company not appearing, judgment was entered in Shaver's favor for \$285.00. At no stage of the proceedings after the dismissal of the action on June 20, 1913, was any notice served upon the railway company or upon the counsel who had represented it in the prior proceedings, but a note or minute of each step taken and each order made therein was published in the Daily Record. When the case was finally called for trial, verbal notice thereof was given or sent to said counsel, who declined to act upon it or to appear or defend.

Upon this state of the record, the railroad company instituted this proceeding in certiorari, asking that the judgment against it be annulled as having been entered without jurisdiction. The return made to the writ of certiorari states the facts substantially as above recited, and the pivotal question we have to consider is whether the trial court acted within the scope of its authority in reinstating the cause after entry of the judgment of dismissal.

Passing for the moment the effect of the publications in the Daily Record and the knowledge by the counsel who had represented the railway company in the earlier proceedings,

we think it a well-settled proposition in this state that when a trial court, acting within its proper jurisdiction, has entered judgment dismissing an action, the case is to be treated as having been finally disposed of, and such judgment cannot be vacated and the action reinstated for trial without notice to the defendant. And this is especially true if the term at which the judgment of dismissal is entered is allowed to pass without any application to vacate it. *Hawkeye Ins. Co. v. Duffie*, 67 Iowa 175; *Townsend v. Wisner*, 62 Iowa 672; *Hamill v. Schlitz*, 165 Iowa 266; *Perry v. Kaspar*, 113 Iowa 268; *Wetmore v. Harper*, 70 Iowa 346; *Kwentsky v. Sirovy*, 142 Iowa 385; *Browne v. Kiel*, 117 Iowa 316. See also *Karrick v. Wetmore*, 25 App. D. C. 415; *Brady v. Ins. Co.*, 67 Ill. App. 159; *Jenkins v. Corwin*, 55 Ind. 21; *Vincent v. Benzie*, 139 Mich. 90.

Authority of a court to vacate a judgment after the term at which it is rendered is statutory (Code, title 20, chapter 1); and to give the court jurisdiction, the party against whom the motion or application is made must be served with notice after the manner of original notices for the commencement of an action (Code Sec. 4095). Without such service of notice or its acceptance or waiver, or an appearance by the party entitled thereto, an order vacating such judgment is necessarily void. Even where the order of vacation of a final judgment

is made at the same term, the same rule has been applied by this court. In *Hawkeye v. Duffie*, 67 Iowa 175, the defendant appeared to an action in the district court and demurred to the petition. The demurrer was sustained, and plaintiff electing to stand on his petition, judgment was entered against him for costs. Later in the same term, the court set aside the judgment and permitted plaintiff to withdraw his election to stand upon his petition and to have thirty days in which to amend. No notice of this application or order was given the defendant and it did not appear thereto. Upon certiorari brought to test the validity of the order of vacation, it was held to be void as having been made without jurisdiction. In thus holding, the court said:

“Final judgment had been rendered. Ordinarily, when this has been done, the case is at an end, except that a motion for a new trial may be filed within three days thereafter. While it may be that the court had jurisdiction of the defendant during such period for the purposes of such a motion, the defendant was not bound to anticipate that the plaintiff would withdraw his election to stand on the petition, or that the court would permit him to do so and file an amended petition, and that the court would set aside the final judgment previously entered. The case having been disposed of by the rendition of the final judgment, the court ceased to have jurisdiction over the defendant in the action, and the defendant's attorney was not bound to remain in court, but could well leave as he did. It may be that the order was one that should have been made, and that substantial justice required the court in this instance to do so. But this is not the controlling consideration. The controlling question is one of jurisdiction, and it is evident, if the court did not have jurisdiction of the defendant in the action, that the expunging order is absolutely void. As the order was made in the absence of defendant in the action, no exception could be taken, and therefore an appeal would have been ineffectual. It is

true, the defendant, when it obtained knowledge of the order, might have moved the court at the succeeding term to set it aside. But the defendant was not bound to do this if the court did not have jurisdiction to make the order at the time it did so."

In *Callanan v. Lewis*, 79 Iowa 452, an order entered without notice to the opposite party, setting aside a judgment at a former term, was held to be "absolutely void." In *Perry v. Kaspar*, 113 Iowa 268, a judgment entry was modified or changed at a subsequent term by striking out the allowance of an attorney's fee which had been erroneously made. No notice was given to the other party, and the failure so to do was held to be a jurisdictional defect, "even though the motion under which such correction was made was filed before the end of the term at which the judgment was entered, it not having been filed until after the judgment was fully entered on the record." We find no approved precedent upon which the order of the district court can be sustained. The cases cited for the respondent go no further than to uphold the rule that the court has inherent authority to set aside a judgment of dismissal or to correct an error in its record, but this authority is not unlimited and may be exercised only where the court has jurisdiction of the person or party adversely affected by such order. When a judgment of dismissal has been entered, the action is at an end. How far the court may properly go in modifying or vacating such judgment at the same term without notice, we need not here consider or decide. In this respect, the courts of the several states are not in harmony. It is, however, quite universally held that such authority extends no farther than the term at which the judgment is entered, and until jurisdiction has been re-acquired by proper notice, a subsequent order of vacation and reinstatement of the cause for trial is void. See authorities already cited. If other authoritative precedent be thought needed, it is found in the recent case of *Owen v.*

Smith, 155 Iowa 463. There a judgment of dismissal was entered and at the next term, upon application of plaintiff, and without notice to defendant, the judgment was vacated. Upon this record, we said, "The judgment of dismissal might perhaps have been vacated under Sec. 4093 *et seq.* of the Code at a subsequent term. But this could not be done without notice to the other party. Without this notice, the court had no jurisdiction and its orders vacating the judgment were null and void."

Unless we are to disregard the statute and overturn all our precedents upon this question and depart from the rule approved by all courts, the necessity of notice to the validity of an order of vacation such as we have here to consider must be recognized. Indeed, any other rule would be manifestly unjust. When final judgment has been entered in an action, the parties thereto ought to be at liberty to regard it as an end of the case and to be relieved from the apprehension of further proceedings therein save upon due notice. To so hold imposes hardship upon no one and affords a safeguard against undue advantage by one party over another.

II. Notice being necessary, we have then to ask whether any was had in this case. That no formal or written notice was served is admitted. Nor can we find any proper ground

upon which we can say that the publication in the Daily Record of minutes of the several orders made in the case can be considered a substituted service which confers jurisdiction upon the court to vacate the judgment. It may be conceded, for the purposes of this case, that the court may, by an order or by a rule of practice, provide that parties who have been brought within its jurisdiction in the manner provided by statute must take notice of all intervening orders and proceedings as published in a designated public journal; but where jurisdiction has not been acquired, or having been once acquired is lost by the entry of a final judgment and the passing of the term at which the entry was

2. JUDGMENTS:
vacation:
jurisdictional
notices re-
quired: sub-
stituted notice
not recognized.

made, it can be obtained or re-acquired only in the manner prescribed by statute, or by the appearance of the party or by his waiver of notice. Here, as we have said, there was no service of notice or acceptance of service, and from the date of the judgment of dismissal, there was no appearance in behalf of the company. It is doubtless true that the counsel who appeared and answered for the defendant prior to the dismissal were informed of the order vacating the judgment and of the re-assignment of the cause for trial, but this, under the repeated holdings of this court, was insufficient to the acquirement of jurisdiction over the defendant. *Owen v. Smith, supra*; *Perry v. Kaspar, supra*; *Bardes v. Hutchinson*, 113 Iowa 610; *Association v. Chase*, 118 Iowa 51; *Kwentsky v. Sirovy*, 142 Iowa 385.

In the *Owen* case, counsel for defendant were not only present when the order for vacation was entered, but also objected thereto at the time; yet we said, "There is no presumption that they had any authority to appear at that stage of the proceedings. The case had been settled at a prior term and they had no implied authority to appear at a subsequent one. Indeed, formal notice to them of the application to vacate would not have been binding on their clients." Very respectable authorities may be cited holding otherwise on this proposition, but the recognized rule in the courts of this state is as above indicated.

III. In argument for the respondent, it is said that the order of dismissal was of itself void, and therefore the trial court never lost jurisdiction to expunge the record and set the cause for trial. This contention is based on the theory that the dismissal was ordered without due notice to the plaintiff in that action. It appears that, by a rule of the trial court, the judge thereof, "whenever it is deemed advisable, upon ten days' notice published in the Daily Record, may call the law docket and upon any such call any cause which has been upon the docket for three con-

8. DISMISSAL
AND NONSUIT:
Inherent
power of court
to enter; failure
to prosecute;
time computation.

secutive terms and not noticed for trial may be assigned, continued or dismissed in the discretion of the judge." A notice of the call of the docket for June 20th and 21st, 1913, was in fact published in the Record of June 10th, and the call was made and the order of dismissal was entered on June 20th. The rule does not call for more than one publication, nor does it require ten clear days. Following the usual rule of excluding the first day and including the last, the required ten days' notice was given. In any event, even if ten clear days were required, the record would not present a case of no notice and the defect complained of would not be jurisdictional. The right and authority to dismiss an action for want of prosecution does not depend upon any rule of court. *Loos v. Cooper*, 141 Iowa 377. The judgment of dismissal was not void and it operated as a final disposition of that action until vacated upon due notice to the defendant.

Further discussion is unnecessary. We are united in the opinion that the court was without jurisdiction to consider the plaintiff's application for reinstatement of the action for trial. It is therefore ordered that the writ of certiorari be sustained and the order made by the trial court vacating the judgment of dismissal and the entry of damages against the defendant be and the same are hereby—*Annulled*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

GALE W. FOFT, Appellee, v. D. M. HAMILTON, Appellant.

FALSE IMPRISONMENT: Mayors—Nonjudicial Acts—Liability.

- 1 Freedom from fear of personal actions for damages in arriving at judicial conclusions is the immunity extended to a judicial incumbent. But he must actually act as such. When he lays aside his robes, he becomes a private citizen, and liable as such. So held in an action against a mayor for false imprisonment.

PRINCIPLE APPLIED: The mayor of a town arrested, or rather, held plaintiff without any information being filed, without any warrant being issued, without any judicial record being made;

refused all bail unless it was cash, though other abundantly good bail was tendered; refused accused a trial, but orally announced a fine without trial; personally took accused to the town jail and locked him up; and on the following day issued a mittimus to the sheriff and personally assisted in its execution. *Held*, said acts were nonjudicial, with consequent liability of the mayor for false imprisonment.

Appeal from Woodbury District Court.—HON. GEORGE JEPSON, Judge.

MONDAY, JUNE 21, 1915.

ACTION for damages for false imprisonment. There was a verdict and judgment for the plaintiff and the defendant appeals.—*Affirmed*.

Henderson & Fribourg, for appellant.

Shull, Gill, Sammis & Stilwell, and *Pitkin & Mullen*, for appellee.

EVANS, J.—At the time of the wrongful acts complained of, the defendant was the mayor of the town of Moville. The plaintiff was a resident of the town of Kingsley, ten or twelve miles distant. On the night of August 19, 1913, the defendant personally arrested the plaintiff and placed him in the village jail and kept him there until the following day. No information was filed before him. No warrant was issued by him. No trial was had. The plaintiff demanding a trial, this was expressly refused. In lieu of bail, the defendant demanded a deposit of \$50 cash, which should be conditioned upon the appearance of the plaintiff upon the following morning, and his payment of an alleged fine of \$10. At the close of the evidence, the defendant moved for a directed verdict on the ground that in doing the acts complained of, he was acting in a judicial capacity as mayor of the town. The ground of this motion was also presented in support of a motion for a new trial. It is the only question which is presented for our consideration on this appeal. That is to say,

upon the whole record, was the defendant entitled to a directed verdict?

The evidence is not greatly in conflict in its most significant features. In so far as there is conflict, the appellee is entitled to have the evidence considered in the light most favorable to him, and our following statement of the evidence will obey this requirement.

On August 19, 1913, at about 7:30 P. M., the plaintiff, a young man twenty-four years of age, drove into the town of Moville in an automobile. He stopped the automobile upon the street and left it standing thereon. Thirty or forty minutes later, he was arrested by the town marshal and brought to the mayor's office. This was done pursuant to a preceding telephone conversation between mayor and marshal. He was orally informed that he was arrested for driving without lights after sundown. The time of sunset was 7:21. He protested his innocence on the ground that he had driven into town before lights were due. He demanded a trial. Thereupon, it was arranged that he might deposit with the mayor \$50 in cash in lieu of bail for his later appearance, and this was done. Thereupon, the defendant purported to arrest or hold the plaintiff upon another charge. What transpired at this point was related by the plaintiff as a witness as follows:

" . . . And he said, 'Now, since you got smart and didn't pay your first fine I have another charge against you.' I asked him what for, and he told me leaving the car stand without lights. I said you don't think you can get me on both charges, and he said, 'Yes,' and I said, 'I don't think you can.' I said, 'I am not guilty and will stand trial.' He said, 'You don't get a trial,' and Lee said to him, 'You have got to give him a trial if he can put up a bond,' and he said, 'No, I don't; he can pay his fine or go to jail.' Finally Mr. Kurtz said, 'Let him put up a \$50.00 bond if he wants to, I don't believe he can get it,' and Mr. Hamilton said, 'If he

will put up a \$50.00 bond, I will accept it.' I asked him if he would accept a check and he said 'no,' and I asked him if he couldn't telephone to some of the banks or friends, or someone he knew to find out if my check wasn't good, and he said 'no,' I would have to get my own bond, so I went down to Haskell's Drug Store. Mr. Jasper and Mr. Kurtz were along, and I asked Mr. Haskell if he could cash another check for \$50.00, and he said he could not; he wanted to know what the trouble was, and I told him, and he said he would go up and go on my bond, and on the way up we met Jim Jackson, a deputy sheriff, so he said he would go up and go on my bond, so they both went up, and I said to Mr. Hamilton, 'These men offer to go on my bond, and if they are good you can make out a bond and they will sign it.' He said, 'They are abundantly good, all right, but I won't accept anything but a cash bond; if they want to put up their checks or cash, I will take that.' I said, 'Didn't you say they were good?' and he said, 'Yes,' and I said 'Make out a bond then, and I am going home,' and he said, 'You are going to jail,' and he got his hat and told me to come with him, and he took me to jail. We started for the jail and got as far as the car and I said, 'Mr. Hamilton, I don't want to go to jail. I have got a car here that cost me \$2,000, and I will let you have that until morning.' He said, 'No, I will show you how to get smart with me,' and he took me on to jail, and when we got down there, I said, 'Mr. Hamilton, I don't want to go into a fire trap like this. I have got a watch and chain and ring that cost \$350, and I will let you hold them and the car until morning,' and he said, 'I will accept nothing,' and he said, 'I will show you Fofts how to get smart with me.' . . . Mr. Hamilton took me down and locked me in the cell."

Immediately after the plaintiff was locked up by the defendant, his friends made strenuous efforts to satisfy the requirements of the defendant so as to release the plaintiff from the jail. The plaintiff's father and brother and an

attorney came down from Kingsley, arriving at about 11:00 P. M., and at once sought to satisfy the defendant upon the subject of bail. The father brought with him the sum of \$1,000 and offered to deposit the same. The offer was refused. Immediate trial was asked. This was refused. On the following morning, the plaintiff was brought to the mayor's office, where he again demanded a trial. This was refused by the defendant on the alleged ground that he knew the defendant to be guilty; and that the defendant had admitted his guilt and had pleaded guilty; and had had all the trial he ever would have. He gave him the alternative of paying an alleged \$10 fine or going back to jail. The payment of a fine being refused by defendant, he was again locked up. Later in the day, the defendant issued a mittimus directed to the sheriff of Woodbury county, and directing the confinement of the plaintiff in the county jail at Sioux City for five days. On the same day, he participated in the execution of the mittimus by accompanying the plaintiff to Sioux City and participating in the delivery of the plaintiff into the custody of the sheriff. At Sioux City, on the suggestion of the sheriff, he reduced the time of confinement to three days.

The foregoing is only a small part of the evidence, but it is sufficiently illustrative of the whole. The argument in behalf of the appellant is that, inasmuch as the offense for

1. FALSE IM-PRISONMENT: which the plaintiff was arrested was within the scope of the defendant's jurisdiction as
- mayors: non-judicial acts: mayor, therefore he was acting in a judicial
- liability. capacity and is not amenable to an action for damages for any error of judgment, and that likewise he is not amenable for such action, even though he acted maliciously or corruptly. A very careful brief is presented to us wherein all our cases are considered and reviewed on the question of whether the judge of an inferior court may be held amenable under any circumstances to an action for damages. The doubtful point of the discussion is whether the

door is opened to such an action by a showing of malice and corruption.

It is the policy of the law that the judicial incumbent shall be free from fear in arriving at judicial conclusions. To this end, he is ordinarily immune from attack by personal action for damages. This is the broad proposition for which the appellant contends. We think that upon this record, the case cannot be made to turn upon this question. The trial court submitted the case upon a theory which did not involve such question. No complaint is made upon this appeal of the instructions of the court, or of any of its rulings, except as it is claimed that the motion for a directed verdict ought to have been sustained. The particular conduct of which complaint is made was not judicial and was not within the scope of any judicial duty on the part of the mayor. The wrongful conduct was not that he reached erroneous conclusions or that he entered an erroneous judgment or order. Granting that, as an individual, he might lawfully, under the statute, arrest the plaintiff for a crime committed in his presence, he would thereby assume the duty of following certain statutory procedure. It was no part of the judicial duty of the mayor as such to arrest the plaintiff or to hold him in custody or to put him in jail. In the doing of these things, he occupied no different position than a private individual would have occupied. So far as the second alleged offense was concerned, the plaintiff was never brought before him by anyone. There was no complaint, oral or written. When the defendant personally locked up the plaintiff in the jail, no information had been laid before him nor laid by him before any other magistrate, nor had any warrant ever been issued by him or by any other magistrate, nor had any judicial record been made, nor had any evidence been heard or pretended trial had. Nothing appears to have been done whereby the jurisdiction of the mayor over the person of the plaintiff could arise. We think it clear, therefore, that the act of the defendant in locking the plaintiff in the jail in the

manner stated was not a judicial act in a legal sense and that the imprisonment thereby effected was false and wrongful within the meaning of the law. The conduct of the defendant was not only illegal and ignorant but it was persistently and extremely arbitrary and oppressive and merits severe rebuke. We think that the motion for a directed verdict was properly overruled. No other question is presented for our consideration. The judgment below is therefore—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

JAMES F. HALLIGAN, Appellant, v. IOWA STEAM LAUNDRY COMPANY et al., Appellees.

PRINCIPAL AND AGENT: "Ratification by Accepting Benefits"—

- 1 **Nonapplicability of Principle—Collateral Holder—Burden of Proof.** One who holds property as collateral security does not, on the theory of ratification by accepting benefits, become responsible for the unauthorized false representations of the real owner in effecting a sale of the property *for his* (the real owner's) *own benefit*, simply because such collateral holder receives the purchase price of the property and applies it on the debt due him from the real owner. The principle "that the *real beneficiary* of an unauthorized transaction, by accepting the benefits thereof, adopts as his own the rascality employed in consummating it" has no application to such collateral holder, receiving and applying the proceeds of the sale, unless the sale was in reality *for his benefit*.

PRINCIPLE APPLIED: One Keeler, by means of false representations, sold certain corporate stock and the proceeds were paid to and retained by one Halligan, who knew nothing about the false representations. The purchaser brought action against Halligan for damages, claiming that the stock bought by him belonged to Halligan, and that Halligan was the principal and Keeler his authorized agent. This last claim the purchaser was unable to prove; so he relied on the proposition that the act of Halligan in receiving and retaining the proceeds of the sale was a ratification of Keeler's unauthorized act. At the time of the sale, Halligan did hold this stock, either by direct issuance to him or by indorsement to him by Keeler. Halligan claimed that

all the stock held by him belonged in fact to Keeler and that he, Halligan, simply held it as collateral security for a debt owing to him by Keeler. *Held*, the pivotal question was, not whether the purchaser knew before he parted with his money anything about Halligan's holding the stock as collateral, but whether the sale was really made *for Halligan's benefit*, and that the burden of proof was on the purchaser to show such fact. If Keeler was the beneficiary *of his own bargaining*, then the receipt of the proceeds of the sale by Halligan, and the act of Halligan in applying it on the debt due him from Keeler, furnished no basis for ratification by Halligan.

FRAUD: Value of Property—Damages—Reliance on Representations

2 —Evidence to Rebut. In an action for damages for false representations in the sale of property (corporate stock) the defendant may show that the property was in fact worth more than the purchaser paid, because tending to show (a) that the purchaser was not damaged, (b) that no fraud poisoned the representations, and (c) that the purchaser did not rely on the representations.

FRAUD: Corporate Stock—Value—Bills Receivable. In an action

3 for damages for false representations in the sale of corporate stock, after negotiations had pended for six months, the defendant may very properly show the bills receivable of the corporation at the time of the sale, as bearing on the value of the stock.

FRAUD: Principal and Agent—Individual Promise by Agent—Ex-

4 isting Facts. A principal cannot be held liable, in an action for false representations, for the statements of his agent in the nature of promises as to what he, the agent, and others would individually do. This drops far short of the rule requiring an assertion of an existing fact.

PRINCIPLE APPLIED: It was claimed that an agent, by false representations, sold certain corporate stock for and on behalf of the principal. The representations alleged were that the principal would, if the sale was effected, retire a certain amount of his stock, and also that a certain amount of stock held personally by the agent and by another person would be retired. *Held*, the latter statements as to what the agent and the other person would do in the way of retiring stock furnished no basis for holding the principal.

Appeal from Scott District Court.—HON. WM. THEOPHILUS,
Judge.

MONDAY, JUNE 21, 1915.

THE case here presented is upon a counterclaim by the defendant against the plaintiff for damages for alleged false representations for the sale of corporate stock. There was a verdict for the defendant for the amount claimed in his counterclaim and the plaintiff appeals.—*Reversed.*

Sharon & Higgins, for appellant.

T. A. Murphy, A. G. Sampson, and Cook & Balluff, for appellees, Iowa Steam Laundry and Wm. Pohlman, Jr.

EVANS, J.—The only issue tried in this case was upon the counterclaim of defendant Wm. Pohlman. The other defendants whose names appear in the title of the case may be wholly disregarded. By his counterclaim, the defendant Pohlman averred that in August, 1908, he purchased of the plaintiff certain corporate stock in the Iowa Steam Laundry Company and that he was induced to make such purchase by certain false representations made to him by another stockholder, Charles A. Keeler. He averred that such representations were made by Keeler as agent for the plaintiff. The defense was a general denial and a special denial of Keeler's agency and an averment that the plaintiff held the stock in question only as security for certain liabilities of Keeler to the plaintiff and that Keeler was the real or equitable owner of the stock. The alleged false representations are set forth in the counterclaim as follows:

"2. That said James F. Halligan, by and through his said agent, Charles A. Keeler, represented to this defendant that there were no debts of said Iowa Steam Laundry Company except certain notes at the Iowa National Bank and a few small unpaid installments on a certain mangle in said laundry and a few small unpaid installments on a cash register in said laundry, none of which said installments were due. That said James F. Halligan was secretary and treas-

urer of the Iowa Steam Laundry Company and, as such officer, charged with the duty of keeping the books and accounts of said company. That said James F. Halligan, through his said agent, Charles A. Keeler, exhibited the books which purported to be and contain the complete accounts of said Iowa Steam Laundry Company, showing the earnings of said company, its indebtedness and its accounts receivable, together with all other financial data affecting the condition of said Iowa Steam Laundry Company. That this defendant was, and is, a competent accountant and examined the books, so exhibited to him, carefully, and that said books did not show any indebtedness of said Iowa Steam Laundry Company. The said James F. Halligan further stated and represented to defendant that the total outstanding capital stock of said company amounted to fifty-four shares held by said Halligan, seventy-eight shares held by Charles A. Keeler and ten shares held by Hugo Moeller, and that if defendant would purchase fifty (50) shares of the stock of the said Halligan, at par, the said Halligan, Keeler, and Moeller, who held and owned all of said stock of said Iowa Steam Laundry Company, would cancel four (4) shares of stock belonging to James F. Halligan, twenty-eight (28) shares of stock belonging to Charles A. Keeler, and ten (10) shares belonging to Hugo Moeller, so that this defendant would be the owner of fifty (50) shares of stock in said company, Charles A. Keeler would own fifty (50) shares, and said one hundred (100) shares would represent the total outstanding stock of said Iowa Steam Laundry Company."

The breach charged was that there was additional indebtedness against the corporation other than that represented, to the amount of about \$900, and that the plaintiff failed to retire the ten shares of stock of Moeller, which were of the value of \$1,000. The laundry company in question was actually operated by Keeler in the city of Davenport. Halligan was a resident of the same city, but was engaged

in other business. Prior to March, 1907, the stock issue consisted of 84 shares, at a par value of \$100 each, and these were owned in equal parts by Keeler and one Lucas. The testimony on behalf of plaintiff disclosed that in March, 1907, he purchased the shares of Lucas at the request of Keeler and that he advanced certain moneys for the use of the corporation, for all of which Keeler agreed to indemnify him. The 42 shares of Lucas were reissued to the plaintiff Halligan, and the 42 shares of Keeler were indorsed to him by Keeler; so that he held the entire issue of stock as security. The preliminary negotiations for the purchase of shares of stock by Pohlman were had between him and Keeler alone. These began in February, 1908. They resulted in more or less of an examination of the affairs of the company by Pohlman. It is not claimed that any false representation was ever made by Halligan personally, nor is there any evidence of any knowledge on his part that false representations had been made by Keeler. At the time of these preliminary negotiations, the issue of stock had been increased to meet the amount of additional investments made, the total number of shares at this time being 142. Of these shares, 54 were issued in the name of Halligan and 78 in the name of Keeler. The Keeler shares, however, were held in whole or in part by Halligan as alleged security under his contract with Keeler. The understanding between Keeler and Pohlman, according to Pohlman's testimony, was that Pohlman should buy the "50 shares of Halligan" at par, and that the other 4 shares of Halligan and the 10 shares of Moeller and 28 of the shares of Keeler should all be retired and that the stock issue should thereby be reduced to 100 shares. There is no claim that Halligan personally had anything to do with this arrangement or had any personal knowledge of it. On July 27, 1908, Pohlman, either alone or with Keeler, went to see Halligan and advised him of the price agreed on between Keeler and Pohlman; \$50 was paid on that day to Halligan. Later, on August 4th, \$2.450 was paid to Halligan, and Pohlman

executed his note to him for the remaining \$2,500. Halligan thereupon surrendered all the stock under his control. According to testimony in his behalf, the amount due him, under his arrangement with Keeler for money actually advanced, was about \$5,700. He was under liability to pay upwards of \$2,000 more, which he later paid. He put the \$5,000 received to the credit of Keeler and looked to him personally for the balance. The question of balance due him from Keeler was later litigated between him and Keeler and the finding was in his favor. As to the first interview with Halligan, Pohlman testified as follows:

“When I went to see Mr. Halligan, well naturally, when I came there,—I don’t remember just exactly, but I know that he told me that probably it was a bad proposition in a way, but he thought it would be a good thing for some young German to come in there and try to boost the business up in a way, I told him I had spoken with Mr. Keeler and that Keeler told me to come up there and make a payment on this for to bind the deal. He gave me a receipt for it. He said they had a chance—that Crook Brothers were figuring on buying them out because they were not doing the way they might do, or ought to do, and if I got in there—and he said that I was up against a kind of a tough proposition, because they were pretty hard competitors, but he hoped I would come out all right. I discussed the details at that time with him. As near as I can remember that discussion was, after we got ready when the deal was closed, I was to pay the \$2,450 and give him a note for \$2,500. I don’t remember what we spoke about, maybe different little things, I don’t remember anything in particular. I don’t remember of ever having had a talk with Mr. Halligan about the terms of this sale, etc., before this time. Before the time I went to see Mr. Halligan at the time I paid him his \$50, I had reached an agreement with Keeler as to the amount I should pay for Halligan’s stock and the terms upon which I was to pay for

it. When I went to see Mr. Halligan at that time, I told him I had reached such an agreement. He said it was satisfactory to him."

I. One of the important questions in the case was as to whether Keeler could be deemed the agent of Halligan in the making of the alleged representations complained of.

1. PRINCIPAL
AND AGENT:
"ratification
by accepting
benefits; non-
applicability
of principle;
collateral
holder: bur-
den of proof.

The trial court instructed the jury that the burden was upon Pohlman to prove that Keeler was the authorized agent of the plaintiff in making such representations, or else that Halligan had afterwards ratified the assumed agency of Keeler. As already indicated, there was no evidence that Keeler was in fact the authorized agent of Halligan; nor was there any evidence of ratification except the ratification that might be implied by the fact that Halligan actually received the purchase money of \$5,000, under the rule of *Eadie v. Eshbaugh*, 44 Iowa 519, and like cases. This rule was laid down by the trial court in instruction 10, as follows:

"10. Ratification is shown when one, after learning all the material facts, accepts the unauthorized acts of another in his behalf, or it may be shown when one receives, accepts and keeps the benefits or proceeds derived or resulting from the unauthorized acts of another in his behalf. When he receives, accepts and keeps such benefits or proceeds, he thereby ratifies and adopts as his own the acts of that other in regard to the matter in hand the same as if done by himself."

Instruction 11 also contains the following:

"It appears without dispute that Halligan has received and accepted and kept the \$5,000.00 proceeds derived and resulting from the sale to Pohlman."

As bearing upon the question of whether Halligan held the stock as collateral security only, instruction 7 was as follows:

"7. There are two preliminary propositions to be decided before proceeding farther: First. Did the 50 shares of stock sold to Pohlman belong to Halligan, or did Halligan hold same as collateral only? And if found that same was only held as collateral security, then did Pohlman have any knowledge or notice thereof before he paid the \$50.00 on the deal? These questions are for you to answer from all the evidence in the case.

"If found that the stock sold to Pohlman belonged to Halligan, or if found that he held it only as collateral security, but that Pohlman had no knowledge nor any notice thereof before he paid the \$50.00 on the deal, then you may proceed to consider the second preliminary issue or proposition, namely: Was Keeler the agent of Halligan in the sale of the stock to Pohlman?

"But should you find, however, that Halligan held the stock as collateral security only, and that Pohlman had knowledge or any notice thereof before he paid the \$50.00 on the deal, you need consider the case no farther; and in that event you should return a verdict for the plaintiff.

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"(c) If you believe from the evidence that Halligan was not the owner of the stock sold to Pohlman, but only held it as collateral security, and you further find that Pohlman had knowledge or notice thereof before the \$50.00 was paid on the deal, then your verdict must be for the plaintiff."

It will be noted from the foregoing that the court laid upon Halligan the burden of showing not only that he was not the real owner of the stock and was not the real beneficiary of the contract, but of showing also that Pohlman had notice of that fact. The rule of ratification announced in the *Eadie case* is one of legal implication. It is implied on the theory that, when the alleged principal is the real beneficiary of the contract, he shall not enforce the contract in his own behalf while repudiating its considerations. He must, therefore, either reject the benefits or be deemed to ratify the

agency. Manifestly, the rule would not be applicable if Keeler was himself the principal and the beneficiary of his own bargaining. The benefits to Halligan would be indirect and consequential only. The proceeds received by him were necessarily applied upon the obligation of Keeler. This was done in ignorance on his part of any false representations by Keeler. This distinction was recognized in the instructions, with the qualification that notice to Pohlman must be proved. The trouble is with this qualification. The burden was upon Pohlman to prove the authorized agency, either by previous arrangement and intent of the parties or by subsequent ratification. The only form of ratification contended for was that the contract was made for his benefit and that he received the benefit. This was a question of fact. Halligan, by his testimony, denied it in the manner indicated. The burden of proof of the ratification was upon Pohlman. Successful denial of the fact relied on was sufficient to defeat claim of ratification. It was the fact itself which was material here, and not Pohlman's knowledge or want of knowledge of it. If, therefore, Halligan successfully refuted the claim that he was the real beneficiary of the contract, it was error to lay upon him the additional burden of proving that Pohlman knew that he was not such beneficiary.

II. The plaintiff offered to show that the value of the stock of the laundry company was greater than the amount paid for it by Pohlman. Evidence along this line was rejected and error is assigned thereon. We think the evidence was admissible for two reasons:

2. FRAUD: value
of property:
damages: re-
liance on rep-
resentations:
evidence to
rebut.

(1) Because the counterclaim pleaded the measure of damages as follows:

"The capital stock which defendant purchased from said James F. Halligan would have been worth the sum of five thousand dollars (\$5,000), which this defendant paid therefor. That under the facts hereinbefore stated and under the actual facts existing, said shares of stock of the said James

F. Halligan were not worth the sum of five thousand dollars (\$5,000), but the value of said shares was reduced by one-half of the indebtedness of said company, amounting to four hundred and fifty-four and thirty-two one-hundredths dollars (\$454.32), and by one-half of the amount paid to Hugo Moeller for his stock, amounting to five hundred dollars (\$500). Said capital stock being worth nine hundred and fifty-four and thirty-two one-hundredths dollars (\$954.32) less than it would have been worth had the representations of the said James F. Halligan, made through his said agent, Chas. A. Keeler, been true."

(2) Because the evidence was admissible as bearing upon the question both of fraud in the representations and in the reliance of Pohlman thereon. The question is analogous to that involved in *Likes v. Baer*, 10 Iowa 89; *High v. Kistner*, 44 Iowa 79; *Vaupel v. Mulhall*, 141 Iowa 365.

The plaintiff attempted to show the bills receivable held by the company at the time of the transfer, and this line of evidence was rejected. When it is remembered that the negotiations between Keeler and Pohlman began in February and were not consummated until August and that the company was a going concern, it goes without saying that the identity of its bills receivable and its liabilities would change more or less in the meantime. We think the ruling of the trial court was too close at this point and that the parties should not have been confined to a consideration of the mere items of corporate liability as specified in the claim.

III. It will be noted that one of the alleged false representations was that Halligan, Keeler and Moeller would retire certain shares of stock held by each one and that this representation failed by the failure of Moeller to retire his 10 shares. We find no evidence that would justify the charging of this representation against Halligan by Keeler as an alleged agent. A part of this representation as pleaded in the coun-

3. FRAUD: corporate stock: value: bills receivable.

4. FRAUD: principal and agent: individual promise by agent: existing facts.

terclaim was that Keeler would retire 28 shares of his stock and that Halligan would retire 4 shares of his stock. Halligan did retire or surrender all the stock which he, in any manner, controlled. Surely, it could not be claimed that Halligan was responsible as principal if Keeler had failed to retire his own 28 shares of stock. There is no ground for saying that Keeler was doing other than speaking for himself as to such 28 shares of stock. Nor can we see any ground for saying that he was speaking for anyone but himself and Moeller if he assumed to promise that Moeller would retire his 10 shares of stock. It does not appear that Halligan had any interest in such 10 shares, or any control of any kind over them, nor did he know of the representation made, if representation there was. Indeed, it is quite as clear that it was not a representation at all of an existing fact. It appears to have been a part of the plans discussed between Keeler and Pohlman as to their future operation of the company. There was no representation of any existing fact, nor is it claimed that there was any fraud even on the part of Keeler other than failure to perform his agreement, if any. The lack of substance in this part of the claim is further indicated by the fact that immediately after the acquisition of Halligan's stock, Keeler and Pohlman acquired the Moeller stock and issued the note of the company therefor without making any request upon Halligan and without notifying him at any time until the filing of this counterclaim of any alleged default in relation thereto. Moreover, Pohlman appears to have paid later his \$2,500 note, without claiming any defense thereto. We think, therefore, that the evidence in this record did not justify a submission to the jury of this item upon a claim of false representations made by Keeler as agent for Halligan. In other respects, we have treated the allegations of the counterclaim as sufficient to present a case of false and fraudulent representations because they have been so treated in the discussion here. In view of a new trial, it may avoid future trouble to

note that the counterclaim contains no allegation of *scienter* or of actual fraudulent intent.

For the reasons indicated, a new trial must be awarded and it is so ordered. The judgment below is therefore—*Reversed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

HYDE PARK INVESTMENT COMPANY, Appellant, v. GLENWOOD
COAL COMPANY et al., Appellees.

DEEDS: Deed Without Reservation Following Town Plat Dedication with Reservation—Construction. The dedication of a city plat (Sec. 914 *et seq.*, Code 1897), containing an express reservation of all minerals underlying the tract, does not, *ipso facto* and as a matter of law, work an entire separation of the original fee into two new and distinct fees, to wit, (1) a fee to the surface and (2) a fee to the minerals, in the sense that a *conclusive* presumption arises that an interest in the surface only is conveyed by subsequent conveyances of the lots by ordinary deeds without reservation of minerals. No such presumption will be indulged. "Intention" remains the all important inquiry, and such intention will be sought out from all the facts and attendant circumstances, and enforced either (a) from the language of the deed itself, if possible, or (b) by reformation where the parties have been mistaken as to the legal effect of the language used. In instant case, held that a deed in the ordinary general form, and without any reservation of minerals, to the lots of an addition dedicated with express reservation of all minerals, was intended to carry the entire interest in the lots and would be enforced accordingly.

Appeal from Polk District Court.—HON. HUGH BRENNAN,
Judge.

MONDAY, JUNE 21, 1915.

ACTION to recover damages on account of alleged trespass upon lands of the plaintiff and for injunctive relief. The

trial court found for the defendants and dismissed the bill and plaintiff appeals.—*Affirmed.*

Cobb, Wheelwright & Dille, and N. E. Coffin, for appellant.

Clark & Hutchinson, for appellees.

WEAVER, J.—On September 22, 1888, John Lyon and Ella M. Lyon, his wife, then being the owners of a tract of 100 acres of land in Polk county, conveyed it to the Hyde

1. DEEDS: deed without reservation following town plat dedication with reservation: construction.

Park Investment Company, plaintiff herein, at the agreed price of \$35,000. Of this price, \$5,000 was paid in cash, the payment of the remaining \$30,000 being secured by mortgage on the land. On December 21, 1888, the deed

and mortgage were recorded, and on the same day, the investment company filed a map or plat of the land divided into 1,000 town lots. In the dedicatory statement accompanying the plat is the following expression of reservation: "The coal and mineral of all kinds underlying the entire tract embraced by this plat with the right to mine and remove the same is expressly reserved." We draw the inference from the record that the investment company was organized and incorporated for the purpose of handling this particular enterprise. The time did not prove ripe for the quick or easy disposal of the lots at a satisfactory profit. Some of the lots were sold and conveyed from time to time; but the title to a large portion of them remained in the plaintiff until lost by tax sale, or until the conveyance thereof to Mrs. Lyon by quitclaim, as hereinafter shown. Soon after the acquirement of the property, plaintiff made lease of the mining rights in the land, describing it as a part of the government survey without mention of the town plat, but no work was done under the lease and it was abandoned or canceled. The city of Des Moines seems to have raised some question about accepting or recognizing streets under which there was a reservation of mining

rights, and the company thereupon, in 1892, executed and filed with the county recorder a waiver or relinquishment to the public of all mining rights under the streets of Hyde Park. Little thereafter appears to have been done or accomplished by the company with reference to the property. John Lyon died, after reacquiring title to some of the lots from or through the grantees of the investment company and by tax deeds and sheriff's sales; and ultimately his widow, Ella M. Lyon (now Runkle), became vested in her own right and as guardian with all the rights or interests of which her husband died seized or possessed in the property which they had together formerly conveyed to the investment company. She also acquired a tax title to a large part of the lots. As owner, she applied to the court and obtained an order or decree vacating about one-half of the plat, and through tax deeds and otherwise, she acquired the ownership of all the property in controversy, unless we are to hold that all these conveyances vested her with title to the surface only, and that title to the coal under the surface remained in the investment company. It should also be said that the mortgage indebtedness had not been paid off or its lien discharged until the transaction of which we are about to speak.

With the title in the condition stated, Mrs. Lyon, for herself and as guardian, undertook, in the year 1902, to convey all the property which had been acquired by herself and John Lyon in the Hyde Park property to A. J. Gray. Gray also acquired title to other parts of the property, and later conveyed all his interests therein to Henry Gray, who is a defendant herein. The conveyance describes the property in part by reference to the government survey, in part by metes and bounds and in other part, by reference to the lots and blocks of the Hyde Park plat. In making the deal with A. J. Gray, objection was raised by him to Mrs. Lyon's title, and especially that it rested to a very considerable extent on tax deeds, it being feared that, as she held a mortgage lien on the property, her tax purchase and deed might be held

not sufficient to bar the right of the investment company to redeem therefrom. Negotiations were thereupon opened between Mrs. Lyon and the investment company to secure an adjustment which would remove this objection and thereby perfect or protect the title made to Gray. It was proposed, on behalf of Mrs. Lyon, to effect that purpose by foreclosure of her mortgage lien and sale of the property, and such proceedings having been begun, the investment company, desiring to avoid the possibility of a deficiency judgment upon which the holders of shares of unpaid stock might be held to individual liability, as well as to avoid liability for taxes which it had left unpaid, proposed or consented to quitclaim to Mrs. Lyon, and this arrangement was agreed upon. Pursuant thereto, the investment company made and delivered to Mrs. Lyon a deed, the body of which is in words as follows:

“KNOW ALL MEN BY THESE PRESENTS: That the Hyde Park Investment Company in consideration of the release of all personal obligations upon the notes or mortgages heretofore executed by said corporation to John Lyon upon property in Hyde Park, an Addition to the City of Des Moines, Iowa, do hereby QUIT-CLAIM unto Ella Lyon Runkle, formerly Ella Lyon, widow and sole heir of said John Lyon, deceased, all interest of every kind and nature in said Hyde Park; it being understood however that as to any purchasers of lots in said Addition who have assumed payment of any portions of any such mortgage or have bought subject to the same, that the said mortgage or mortgages shall remain a lien as against said purchasers upon their covenant or undertaking to pay same, or as a lien against the land purchased by them until so paid and may remain in full force and effect, as a lien or demand against any part of the said addition prior to any claim or demand of any lien holder against the said Hyde Park Investment Company, but no personal judgment shall be taken nor personal decree had in any event against the said Hyde Park Investment Company upon any such note or mortgage or any part thereof.

"This quit-claim being duly made in pursuance of the resolution of the Board of Directors of said Hyde Park Investment Company by its President and Secretary duly thereunto authorized."

About this time, A. J. Gray, the purchaser from Mrs. Lyon, entered into a written agreement with the Glenwood Coal Company, defendant herein, giving that company the exclusive right to mine coal under the land "previously known as the John Lyon farm or Hyde Park Addition," the consideration therefor to be paid in the form of royalty upon the product of such mine. Under this lease or agreement the coal company began at once to drill and prospect for coal, and in July or August, 1903, began to sink a shaft for the opening of a mine. In about three months, the shaft was completed, at which time the mine was equipped with engine, fan and other things necessary to be used in removing the coal. This preliminary work was done at an expense of nearly \$20,000. The mine continued to be operated by the coal company from its opening in 1903 until this action was begun November 18, 1909, such operation being also continued pending this litigation. Neither Mrs. Lyon nor the Grays nor the coal company had any knowledge that the investment company had or claimed to have any rights in the property or in the coal under the surface after the making of the quit-claim deed until several years after the lease of the mining rights to the coal company in 1903, and after a very large amount of money had been expended in developing and operating the mine. The work was done openly; the officers of the investment company were residents of the city; and the testimony fairly tends to show that they knew the Glenwood Company was in possession and doing this work under the lease from Gray; and they neither objected thereto nor notified the company or Gray that they claimed any adverse interest in the premises for a period of several years and until shortly before bringing the action. In none of the

conveyances made by the investment company of lots in Hyde Park has there been any reservation of coal rights, unless such a reservation is to be implied from the language of the declaration upon the original plat.

The petition sets up the original purchase by which plaintiff obtained title to all the coal lying in place under its surface, and alleges that it has ever since been and still remains the absolute owner thereof. It alleges that the defendants have wrongfully and by force entered upon said property and mined and removed coal therefrom and have in fact severed, taken away and converted coal belonging to plaintiff to the value of \$800,000, for which it demands a recovery.

The defendants answer severally, denying the allegations of the petition. They also allege a state of facts substantially as above stated and say plaintiff's alleged right of action is barred by the statute of limitations, and set up the conveyance to Mrs. Lyon and to Gray as having effectually vested the title to the lands, including the coal thereunder, in the defendant Gray, whose lease is the coal company's sufficient authority for opening and operating the mine. They also allege that the quit-claim deed made by the plaintiff to Mrs. Lyon in 1903 was intended and understood by the parties as effecting a re-conveyance to the grantee of the right and title and interest in the land which the investment company had formerly acquired from Mrs. Lyon and her husband; and if the court finds that the said deed is not sufficient in form to operate as such a conveyance, the defendants ask for a reformation of the instrument to make it express the true intent of the parties. They also plead the conduct of the investment company in standing by and seeing defendants expend a large amount of time, labor and money in operating the mine, believing themselves to be entitled so to do, without any objection on plaintiff's part and without notice of any adverse rights, as grounds upon which it ought to be estopped to assert any right hostile to those of the defendants.

After hearing the testimony, the trial court found that

the evidence was insufficient to sustain the claim sued upon and that the equities were with the defendants. It also found specially that the deed of 1903 by the investment company to Mrs. Lyon was intended to convey all the grantor's estate in the land, both in the surface thereof and in the coal underlying it.

If we were to take the record literally as printed and laid before us, we should have to hold that no appeal had been taken, for it is there said the notice was given on the "18th day of August, 1903." We pass this discrepancy, however, and assume that "1903" is a typographical error and that the date intended is 1913.

For the most part, the matters we have recited are without dispute in the record, and in so far as the other statements are the subject of controversy, we find the weight of the evidence fully justifies them.

I. The fundamental proposition upon which appellant bases its claim of right is that the form of the dedication, including, as it does, the expressed reservation of coal and mining rights works in a legal sense a severance of the surface of the land from the coal beneath, and that the plat was a mere platting or mapping of the surface, and the deeds thereafter made to lots in such plat conveyed title to the surface only, even though the deed itself makes no mention of the reservation.

Without at this time deciding whether, under our statute for laying out towns and additions thereto, it is competent for a landowner, who, theoretically at least, owns to the heart of the globe, to slice his holdings by imaginary horizontal cuts into multiple sections, one superimposed upon another down to the home of the terrestrial center of gravity, we think the abstract proposition contended for by appellant that a grantor may plat the surface only may readily be admitted for the purposes of this case, without affecting the result. Whether platted or not, it is, of course, within his power to convey the surface to one person and the mineral below the

surface to another, or he may convey either the surface or the underlying mineral to one person and retain the remaining part of the estate to himself. When the ownership is thus divided, the estate in the surface and the estate in the mine are severed, but we think it cannot be said that the mere platting affects the nature or (if we may use that word) the solidarity or integrity of the estate of the owner in the land as one individual entity, except, perhaps, as his rights are affected by the streets and public grounds which he has dedicated to the public. After the plat is made and recorded, he is still the owner of the property from the earth's center *usque ad coelum* and he holds it by precisely the same title as before, and he may still sell and convey the surface above and the mine below together or separately, as he will. It follows, we think, that if the owner of such a lot conveys it by a description such as would be regarded as sufficient to convey the entire title in ordinary cases unaffected by a reservation, there is no conclusive presumption from the reservation in the plat that his conveyance was executed, delivered and accepted with the understanding that it should convey the surface right only. In other words, the grantor owning both the surface and the mineral, and the deed upon its face indicating no restriction or reservation, we see no difficulty in giving it effect as a conveyance of the whole statute if the evidence makes it clear that such was the intent of the parties.

Referring now to the deed from the investment company to Mrs. Lyon in 1903, we are of the opinion that upon the record, it is not open to reasonable doubt that, for the considerations therein mentioned, it was the intention of the parties that the company should, so far as was then in its power, re-convey to Mrs. Lyon all the property which it had formerly acquired by the conveyance from her and her husband while she, upon her part, released the company and its stockholders from all personal liability for payment of the mortgage debt and taxes. It is true that when this agreement

was made, the subject of coal and coal rights was not mentioned, but this only strengthens the conclusion which is so clearly pointed to by all the circumstances of the transaction, that all concerned were taking it for granted that a quit-claim from the company was all which was required to reclothe Mrs. Lyon and her grantee with the entire title. It is a preposterous suggestion that Mrs. Lyon, who had contracted to convey a good title to Gray and had entered into this negotiation for the express purpose of eliminating, if possible, any right or interest of the investment company and thereby making good her warranty to her grantee, would have released her debtors from all liability upon a very large indebtedness, simply to get a quit-claim which meant practically nothing, and leave the title she was trying to mend fatally defective. In closing the transaction, she employed the firm of Earle & Prouty, lawyers of ability and large experience, to protect her interests. Mr. Earle, as a witness, speaking of the negotiations in which he took part, says: "There was nothing said about the coal being reserved. My understanding was that we were getting everything the Hyde Park Company had there. I knew the company had purchased that property and that this was a purchase money mortgage. . . . I certainly would not have advised Mrs. Runkle to accept a quit-claim deed to the surface of the ground and satisfy her mortgage claim." Mr. Anderson, who represented Mr. Gray in seeking to have the title perfected, corroborates the testimony of Mr. Earle. Mr. Harding, who, as manager of the investment company, represented it in this matter, says: "The property we intended to convey was the property covered by the mortgage," and agrees that the inducement thereto was to avoid having a foreclosure sale, resulting in a deficiency judgment against his company, to avoid any proceedings against himself and others personally on account of their liability as stockholders, and to relieve Mrs. Runkle from the expense of foreclosure proceedings. In considering this branch of the case, there is another circumstance of some

value as a side light. The land conveyed by Lyon and his wife to the plaintiff was described in bulk as a one hundred-acre tract, while the mortgage given back to secure the purchase money describes the property as the lots and blocks of Hyde Park. So far as we have noticed, no witness attempts to explain this, but the circumstances point unmistakably to this explanation: The land was being bought with a small payment down, the remainder to be secured by mortgage; but under the statute, in order to make a valid platting into town lots, it must be certified that the land is free from incumbrance. Code, Sec. 915. It was, therefore, evidently arranged that the deed to the company should precede the mortgage long enough to enable the company to make and file its plat, and then the mortgage should go upon record describing the property in accordance therewith. The letter of the law was thus complied with, so far as record liens are concerned. Whether its spirit was violated, we need not inquire. Again we say it is quite incredible that Lyon, who was selling the entire property, both surface and mineral, should have taken this mortgage to secure six-sevenths of the entire purchase price with the belief or understanding that the lien of his security attached only to the surface of the property and left the underlying coal, constituting much the larger part of its value, free from all incumbrance in the hand of his grantee, a corporation which, so far as appears from the record, was without a single asset other than this property, upon which it had paid less than fifteen per cent of the agreed consideration. It is equally incredible that the company or its incorporators supposed or believed that they were getting any such advantageous bargain. These facts, with the attitude and conduct of the parties on both sides in this transaction and in the negotiations at the time of the reconveyance in 1903, the circumstances under which that reconveyance was made and its avowed purpose, and the otherwise incomprehensible silence and acquiescence on the part of plaintiff for years, in the presence of the known fact that Gray and his grantees

and lessees were openly exercising acts of ownership over the entire property, and mining, removing and marketing the coal in large quantities, constitute a most convincing array of evidence that, whatever may now be said or claimed as to the legal effect of platting the land with a reservation of this kind, all parties on both sides intended and understood that the mortgage lien attached to the entire property, both surface and mineral, and that the reconveyance in 1903 was intended to restore the entire property to Mrs. Lyon so far as the company was then able to do so. Indeed, we think it not an unfair conclusion, from the admitted facts, that neither the company nor its officers supposed or believed it had any remaining interest whatever in the property until shortly before this action was begun, when it may be presumed that someone made a discovery, not of the facts, for they had been known for years, but of a principle of law which, applied to those facts, might possibly give life and validity to a claim for damages to the amount of nearly or quite a million dollars. There is no evidence in the record that anywhere or at any stage of the dealings between the plaintiff and John Lyon or Mrs. Lyon was it ever mentioned or suggested that the mortgage lien was restricted to the surface of the land, and the claim now asserted to that effect rests for its foundation solely upon the assumption that, as a matter of law, the deeds and mortgages are to be read and interpreted with reference to the reservation in the plat. But it was competent for these parties to treat these instruments as having the effect which is usually and ordinarily given to instruments of that character, and this they clearly did. Such treatment is evidence of the mutual intention with which the instruments were made and delivered. It constituted one of the attendant facts and circumstances into which the court may always inquire, and if upon no rule of construction can the written contract be enforced according to the well-established intent of the parties, it will be re-formed accordingly. This rule is not confined to mere mistakes of fact; for it is well established in this state

that where the parties have been mistaken as to the legal effect of the language of their contract, a reformation will be ordered. *Hausbrandt v. Hofter*, 117 Iowa 103; *Goodrich v. Fogarty*, 130 Iowa 223; *Stelpflug v. Wolfe*, 127 Iowa 192.

Being thoroughly convinced that the legal effect which plaintiff now seeks to give its conveyance to Mrs. Lyon differs radically from the effect that both grantor and grantee intended at the time the deed was made, we hold that the claim so asserted cannot be equitably sustained and that the conclusion announced by the trial court ought not to be disturbed.

We will add that the same result might well be attained upon the issue of estoppel, but having found that the decree may be affirmed upon consideration of the general merits of the controversy, we do not prolong this opinion to set out or discuss the evidence bearing upon the alleged estoppel.

The decree of the district court is therefore—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

ROBERT ROGERS, Appellant, v. WILLIAM TEAGER, Appellee.

LANDLORD AND TENANT: Forfeitures—Duty of Landlord—Right

- 1 **of Tenant—Opportunity to Perform.** Optional rights of forfeiture are not favorites of the law. For instance, if a tenant does, or fails to do, some act which the landlord may, under his lease, either (1) forgive and ignore or (2) seize upon as the basis for a forfeiture, the landlord, to avail himself of the latter, must (a) promptly manifest his intention to demand the doing or the not doing of the particular act in question, and (b) by demand or notice give the tenant the opportunity to avoid the forfeiture if he can.

PRINCIPLE APPLIED: The rent reserved was half the grain, "delivered to market at the option" of landlord, and certain cash rent for other lands, all payable March 1st. Lease provided that the tenant should (1) destroy certain weeds, (2) haul out manure, and (3) remove none of the crops until rent was paid, and that, upon failure to so do, the landlord had the right to

declare the entire rent due and to retake possession of premises and proceed to collect rent and damages. In December the landlord and tenant had some dispute over the division of corn, and two months before the rent was due under the lease, the landlord brought an action for his rent and damages, "because defendant had failed to haul the manure, destroy the weeds and had removed part of the crop from the premises without paying the rent," and plaintiff "now elects to declare all rent and damages due." No complaint as to the failure to destroy the weeds or haul the manure had theretofore been made. No demand had been made that the corn be delivered. The tenant had even offered to haul to market on request. The landlord did not re-enter the premises. *Held*, there was no forfeiture, and the action was premature, irrespective of whether the tenant had done anything upon which a forfeiture *might* have been legally declared.

APPEAL AND ERROR: Affirmance and Remand for Judgment. A 2 cause may be affirmed and remanded for judgment on the verdict.

PRINCIPLE APPLIED: In instant case, the appeal was from an order directing a verdict against appellant. Abstract failed to show the entry of any judgment on the verdict. No question was raised as to the right to maintain the appeal. Cause affirmed on the merits and remanded for entry of judgment on verdict.

Appeal from Harrison District Court.—HON. J. B. ROCKAFELLOW, Judge.

MONDAY, JUNE 21, 1915.

ACTION at law upon a written lease of land for the recovery of rent and for damages for alleged violations of the terms thereof, and for the enforcement of a landlord's lien. At the close of the testimony, the court sustained the defendant's motion for a directed verdict in his favor and the plaintiff appeals.—*Affirmed and Remanded.*

Cochran & Barrett, for appellant.

Roadifer & Roadifer, for appellee.

WEAVER, J.—Plaintiff made to defendant a lease of his farm for the term of one year, beginning March 1, 1913. The rental agreed upon was one-half of all grain raised on the premises “delivered to market at the option” of the lessor, also cash rent for the land then seeded to alfalfa at \$7.00 per acre, and for land then in pasture, \$5.00 per acre. It was further agreed that 16 acres of the cultivated

land should be planted to small grain and the remainder (except land in alfalfa and pasture) should be planted to corn. All rent was made payable March 1, 1914. The lease contained very numerous printed provisions as to the duty of the tenant, among which he was to cut or pull cockleburrs and Russian thistles, repair fences, haul out manure and should remove none of the crops until the rent was paid; and that, upon failure to perform these duties, the landlord reserved the right to declare the entire rent due and payable, and to re-take possession of the premises and proceed at once to enforce collection of all rents provided for in the lease, together with the damages resulting from the lessee's breach of the contract. After the close of the cropping season, and two months before the rent would regularly become due under the conditions of the lease, plaintiff began this action to recover the whole of the rent and damages, alleging the same were then due and payable, because defendant had failed to haul out the manure or to exterminate the burrs and Russian thistles and had removed a part of the crops from the premises without first paying the rent, and that because of such violations of the contract the plaintiff “now elects to declare due all rents, including damages.” The defendant appeared to the action and admitted the lease, but denied all other allegations of the petition. Trial was had upon the issues thus joined and at the close of the evidence offered by the plaintiff, the court sustained the defendant's motion for a directed verdict in his favor, because it appeared from the evidence, as a matter of law, that nothing was due the plaintiff

1. LANDLORD AND
TENANT: for-
feitures: duty
of landlord:
right of ten-
ant: oppor-
tunity to
perform.

under the terms of the lease, at the time this suit was begun. Error is assigned upon this ruling.

The evidence shows without substantial variation that defendant took possession of the land at the beginning of his term and continued to occupy and cultivate it until after the close of the cropping season, without any objection by the plaintiff as to his manner of using or caring for the premises and without notice of any kind of the plaintiff's intention to declare the rent due before the expiration of the lease. About the middle of December, 1913, some dissatisfaction arose in plaintiff's mind with respect to the quantity of corn which was being set aside for his share. Of this circumstance, the only testimony is that of the plaintiff himself, which is set forth in the abstract as follows:

"About December 13, 1913, I had a conversation with William Teagar on my farm about the rent. I requested him to come down and we would get things straightened up. I asked him if he had everything collected up together, and he said he did. Well, I asked him where my share of the crop was, and he took me out to the crib and showed me. I asked him if that was my half share and he said 'yes,' and I told him I was not satisfied with it and he said that that was all the corn I had, that I got my half share of the corn and that I could measure his. He said I had my share of the corn and I claimed I did not have my share of the corn. There was between 50 and 52 acres in corn. I farmed the place for 6 years and I know for a certainty how much there was in corn this year. There is 78 acres in the farm, of which 10 acres is to wheat and the balance to alfalfa and pasture. When I was there in November, the corn was all harvested except what was in the shock and he told me I had no interest in the shock corn, that all of my share was in the crib."

So far as appears, there was no other subject of difference between them, and the subject of alleged violations of the lease with respect to the manure and the weeds was not

mentioned. No demand was made upon defendant or direction given him when or where to deliver plaintiff's share of the corn. Indeed, plaintiff admits that defendant expressed his readiness to haul it at any time when plaintiff should inform him where to deliver it. He further admits that he did not then and never has told the defendant where he wished it delivered.

Upon this record, there can be no doubt of the correctness of the trial court's ruling. Even though the defendant may have violated or neglected to perform some of the stipulations of the lease, it did not operate automatically to work a forfeiture of his leasehold or to make the rent due or collectible at once. Indeed, plaintiff's own construction of the lease, as stated in his petition, is that, by virtue of the provisions of that instrument, he had "the option to declare all of the rent due," etc. In other words, and at the very most, if the terms of the agreement were violated by defendant, plaintiff could, by taking the proper steps, forfeit the lease, or he could waive the forfeiture and await the expiration of the term to demand and collect the rent and damages, if any were then due him. It is unnecessary to here go into the question whether defendant did or did not give the plaintiff ground upon which to declare a forfeiture; for if such ground existed, plaintiff must exercise his option to forfeit, before a right will be acquired to sue and recover the rent in advance of the agreed date of payment. It is not enough to sue first and then say to defendant, "I *now* elect to declare the whole rent due." Such a right would open the door to intolerable oppression and hardship. The authorities are practically unanimous that a reserved right in the landlord of an option to forfeit is waived if not exercised promptly upon occurrence of the act or default complained of, and is not effected without notice or opportunity given the tenant to avoid the forfeiture by due performance of his contract, if he can do so. Nothing of that kind was done here. So far as appears, no complaint was ever made to defendant

with reference to the weeds or the fences or the manure; no demand was made upon him for a delivery of the corn; and there can be no presumption that, when demand is made, he will not deliver all the corn to which plaintiff is entitled. The suit was prematurely brought and it cannot be sustained. Stated in other words, no suit to enforce an optional right of forfeiture will lie until a forfeiture in law and in fact has been effected by notice or demand or by a re-entry for condition broken. As no demand was made or notice given, and no re-entry by the lessor for condition broken, there was no forfeiture and consequently no matured right of action. *Cole v. Johnson*, 120 Iowa 667; *Alexander v. Touhy*, 13 Kan. 64; *Walker v. Engler*, 30 Mo. 130; *Catlin v. Wright*, 13 Neb. 558; *Chapman v. Wright*, 20 Ill. 120.

Courts are not inclined to sustain forfeitures of the kind here asserted on doubtful or merely technical grounds, and the person claiming such a right must bring himself strictly within the conditions precedent to its enforcement. This the plaintiff has not done.

Counsel's argument in support of the appeal seems to proceed on the theory that the evidence was sufficient to justify finding that defendant had violated several of the provisions of the lease and this is all which was required to entitle the plaintiff to go to the jury; but for the reasons already mentioned, something more than a violation of the lease is required to sustain an action for recovery of the rent before the date fixed for such payment in the lease itself. The verdict was properly directed for the defendant.

The appeal seems to have been taken from the ruling directing a verdict for the defendant, and the abstract shows no entry of judgment on the verdict as returned. No ques-

tion is raised by counsel as to the right to maintain such an appeal, and we raise none. We mention it only to indicate the necessity of a remand for the entry of the proper judgment. Such judgment should, of course, be in abatement

2. APPEAL AND
ERROR: affirm-
ance and
remand for
judgment.

only and not as determinative of the merits of plaintiff's claim for recovery of rent or damages. The cause will, therefore, be remanded to the district court for the entry of judgment upon the directed verdict.—*Affirmed and Remanded.*

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

LUTHER VERBECK, Appellee, v. W. J. PETERS, Appellant.

CONTRACTS: Landlord and Tenant—Lease—Construction—“General Expressions Followed by Special Enumeration”—When General Rule Nonapplicable. The rule of construction that “a general word or clause followed by other words of specific or particular enumeration ordinarily includes no more than the things specifically mentioned” has no application (a) when the writing fairly demonstrates that such was not the intention of the parties, (b) when the application of the rule works absurd results, or (c) when the general expression and the particular enumeration can both be given force and effect without inconsistency. In instant case, *held*, general rule not applicable.

PRINCIPLE APPLIED: The general clause of a lease provided: “Lessee agrees to pay the yearly rent of one-half of all crops raised on aforesaid land and \$5 per acre for pasture,” followed immediately by a *particular* clause, viz., “payable as follows: one-half of the small grain . . . and one-half of the corn . . .” The lease also provided that the landlord's share should be “delivered . . . into bins and cribs on said premises furnished by lessor. . . .” The lease further provided: “Rent of pasture land to be paid . . . out of oat crop receipts; that all work land not in grass shall be put in grain and for any work land not in grain lessee shall pay lessor five dollars per acre.” *Held*, the *particular* clause did not limit the rent for the meadow (hay) land to \$5 per acre, but that the *general* clause fixed such rental as “one-half” of the hay.

Appeal from Grinnell Superior Court.—HON. P. G. NORRIS, Judge.

MONDAY, JUNE 21, 1915.

ACTION brought in equity by a lessor to enjoin his lessee from removing or selling crops and other property from the

leased premises and for other relief. Decree for plaintiff and defendant appeals.—*Affirmed.*

Bray, Shifflet & Wilkie, for appellant.

Rayburn & Lyman, for appellee.

WEAVER, J.—Plaintiff leased to defendant a part of the Northeast Quarter of Sec. 32, Township 80, Range 15, for the year beginning March 15, 1913. The provision of the written lease fixing the amount of rental to be paid

1. **CONTRACTS :**
landlord and
tenant : lease :
construction :
"general ex-
pressions fol-
lowed by spe-
cial enumera-
tion" : when
general rule
non-applicable.

is in the following words:

For rent for said premises, lessee covenants and agrees to pay said lessor the yearly rent of *one-half of all crops raised on aforesaid land—Dollars,* payable as follows: *One-half of the small grain raised on said land, and one-half of the corn raised thereon, and five dollars per acre of and the sum of for pasture land, and in said part of the for hay land and northeast quarter of above described land and in addition to work and pay the road tax on said premises each year during said term.*

The crop to be divided according to the usual custom, the lessor to pay for one-half of all seed used on said land, and for one-half of all fees for thrashing all small grain raised on said land, and for one-half of binding twine used in harvesting oats on said land, and quality as well as quantity to be considered, and the share of lessor to be securely stored and cared for on said land and delivered as follows:

Into bins and cribs on aforesaid premises, furnished by said lessor. That all small grain shall be stacked and threshed before November 1st of each year, and all corn picked and in crib before December 15th of each year; that notice of threshing shall be given lessor at least a week prior to the day of threshing. The cash rent to be paid as follows: *Rent of pasture land to be paid soon after thrashing, out of oats crop receipts; that all work land not in grass shall be put in grain,*

and for any work land not in grain lessee shall pay lessor *five* Dollars per acre. *For pasture land (as above).*

The lease was written upon a printed form, a part of the printed matter being erased in the manner above indicated, while that part of the quotation in italic indicates the words written into the blank form before it was signed by the parties.

This action was begun December 13, 1913. In the first count of the petition, plaintiff states that he has received his full rental share of the small grain and corn raised on the premises, but that there is still unpaid the cash rent on the pasture land and the rental share of the hay crop and that defendant has removed and threatens to remove the crops and other property without the payment of such rent. The claims set up in another count of the petition are not involved and we need make no further reference thereto.

The defendant denies that plaintiff is entitled to any share in the hay crop and says he is not bound under the terms of the lease to pay a share rent for the hay land, but to pay cash rent at the rate of five dollars per acre, and is ready and willing to make payment on that basis. The trial court found for plaintiff upon this issue and held that the stipulation for cash rent applied only to the pasture land. From this ruling, the defendant has appealed.

The one question we have to consider is the proper construction of the lease and to decide whether the stipulation by which the lessee undertook to pay "the yearly rent of one-half of all crops raised on the aforesaid land" includes rent for the hay land, or whether this provision is so modified or limited by the rest of the writing as to exclude the hay crop and to make the rent for hay land payable in cash at five dollars per acre.

While the lease is in some respects awkwardly drawn, we think, when read as a whole, there can be little doubt of its real meaning, and that the conclusion arrived at by the trial court is inevitable. In the first place, the agreement is

to pay "one half of all crops raised on the land," and assuredly hay is a crop in the usual and accepted sense of the word. To avoid this point, it is urged that the words following the phrase, "payable as follows: one-half of the small grain, one-half of the corn and five dollars per acre for the pasture land," without specific mention of the hay crop, bring the provision within the rule by which a general word or phrase followed by other words of specific or particular description is ordinarily held to include no more than the things thus specifically mentioned. That such is the rule in a proper case must be admitted, but it is not of universal application; for if the writing, when taken altogether, fairly demonstrates that such was not the intention of the parties, or if the application of the rule will necessitate an absurd or unreasonable result, it will not be applied. Moreover, it has no proper application where both the general expression and the particular description or enumeration can be allowed to stand without repugnance or inconsistency. In other words, if reasonable effect can be given to both, each is to have effect according to the usual and approved usage of our language. See for example Bishop on Contracts (Ed. of 1887), Sec. 409; *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581; *Wood v. Lindley*, 40 N. E. 283; *Corwin v. Hood*, 58 N. H. 401; Pollock's Contracts, 436 and 437 (Ed. of 1878).

The general provisions for rents are one-half of all crops raised on the land and five dollars per acre for pasture. The particular recital is that the lessee shall pay the lessor one-half the small grain and one-half the corn to be divided according to the usual custom and delivered in bins and cribs furnished by the lessor. This it will readily be seen is not inconsistent with the general declaration that the lessor shall have one-half of all the crops. The omission of any reference to the hay crop in this connection may render it doubtful where the lessee should deliver the landlord's share of the hay, but involves the previous clear and specific declaration that the lessor shall share in all crops in no uncertainty.

Both can stand and both be enforced without inconsistency. If we were to accept and apply the rule relied upon by appellant, the necessary effect of it would be to relieve the defendant from all legal obligation to pay anything whatever, either crop or cash, for the use of the meadow land, unless we are to go farther and arbitrarily hold that the undertaking to pay five dollars per acre "for the pasture land" is capable of a construction broad enough to include the meadow land, which is nowhere specially mentioned in the lease. No rule or authority for such a stretch of the court's power is cited by counsel and we doubt if any can be found. The intent to lease all the land described therein and that defendant shall, in one form or another, pay rent on all the land is too clear for any doubt. The final clause in the above quotation from the lease is very evidently intended to prevent the possibility of a loss of rent in some form by the neglect or refusal of the defendant to cultivate and raise grain of some kind on all the land under actual cultivation; and if he shall fail to do so and permit any of the cultivated area to lie idle or unused, he is required to pay five dollars an acre therefor. There is nothing in the record suggesting such a failure, and this clause has no effect upon the rights of the parties as stipulated in the earlier part of the paragraph so as to except the meadow land from the provision for the payment of a rental share of all crops.

The defense cannot be sustained and the judgment below is—*Affirmed*.

DEEMER, C. J., EVANS and PRESTON, JJ., concur.

W. B. DORAN, Appellee, v. WATERLOO, CEDAR FALLS & NORTHERN RAILWAY COMPANY, Appellant.

MASTER AND SERVANT: Safe Place to Work—Sanding Street
1 **Car Tracks—Negligence.** A master must furnish his servant a reasonably safe place in which to work and must keep it reasonably safe. *Held* a jury question, in instant case, whether

the master had failed to meet its duty in this respect and was negligent by reason of not having sanded its tracks or equipped its cars with sanding devices, and thereby prevented an approaching car from sliding through a car barn door and injuring the servant working therein.

APPEAL AND ERROR: Trial—Exclusion of Evidence Otherwise

- 2 **Brought Out.** Error cannot be predicated on the exclusion of evidence pertinent to the issues when such evidence was fully brought out in other portions of the witnesses' testimony.

WITNESSES: Ancient Rule Against Impeaching One's Own Wit-

- 3 **ness—Modification Recognized.** It is an ancient rule that one may not impeach his own witness even by showing that the witness has made statements out of court inconsistent with his statements in court. But when a party to an action has been deceived, apparently with deliberation, into calling a witness to the stand under the bona fide belief that he would testify to a certain state of facts and the witness proceeds to testify squarely to the contrary, the party calling such witness is not entirely helpless. In instant case, the reading of the written testimony of the witness (taken on a former occasion) "in order to refresh his memory" and set counsel right with the jury was approved.

TRIAL: Instructions—Stating Grounds of Negligence—Non-necessity

- 4 **to Repeat.** After the court has once clearly stated the grounds of negligence upon which plaintiff's cause of action is predicated, it is not necessary to continue to repeat them in subsequent paragraphs.

TRIAL: Instructions—Stating Affirmative and Negative Proposi-

- 5 **tion—Sufficiency.** The reverse of an affirmative proposition need not necessarily be elaborated with the same fulness as was employed in stating the affirmative. For instance, the jury was sufficiently guided where it was told that if they found that the defendant street railway company should have sanded its tracks, in the exercise of reasonable care, and did not do so, and that the injury was the proximate result of such failure, and that the injured party was not negligent, then he could recover, "otherwise not." The two latter words, under the record in case at bar, and to a jurymen of common understanding, clearly suggest and state the reverse of the proposition immediately preceding.

MASTER AND SERVANT: Concurrent Negligence of Fellow Serv-

- 6 **ant and Master—Statement of Rule—Instructions—Hypercritical Objection.** The following instruction is held to sufficiently and correctly state the Concurrent Negligence Rule: "If plaintiff

was injured as a result of the negligence of said motorman alone and without any fault or negligence on the part of the defendant company, then plaintiff is not entitled to recover. . . . If, however, the motorman was negligent and the defendant was also negligent as alleged, and if plaintiff, without contributory negligence on his part, was injured as the direct and proximate result of the concurrent negligence of said motorman and defendant, then plaintiff is entitled to recover.''

TRIAL: Instructions—Placing Undue Emphasis on Certain Evidence.

7 Instructions should not unduly emphasize certain evidence to the exclusion of other equally relevant evidence, but *held*, rule not violated.

TRIAL: Instruction Inartificially Drawn—Test to Apply. An inarti-

8 ficially or clumsily drawn instruction does not necessarily demand a reversal. Instructions must not be considered abstractly and apart from the record to which they are applied. The subject-matter must always be kept in mind. They are sufficient if, to a man of ordinary intelligence, a correct understanding of the law is given in the charge as a whole. Instruction reviewed, and *held* not to misdirect the jury as to what negligence would render the defendant liable.

DEEMER, C. J., and SALINGER, J., dissent as to the construction placed on the instruction in question.

Appeal from Bremer District Court.—HON. C. H. KEILEY, Judge.

TUESDAY, JUNE 22, 1915.

ACTION to recover damages for personal injury. Judgment for the plaintiff. Defendant appeals.—*Affirmed*.

Ainsworth & Hughes and Wade, Dutcher & Davis, for appellee.

Hagemann & Farwell and C. E. Pickett, for appellant.

GAYNOR, J.—At the time of the happening of the accident complained of, defendant operated an electric railway in Waterloo, Iowa, and had two lines of electric interurban railways running out of Waterloo to Cedar Falls and Waverly, respectively. Broadway is a public street in the city of

Waterloo and runs east and west. About 300 feet east of Broadway, the defendant maintained a car barn for the storage of its electric cars and also its interurban cars. There are four tracks leading from the street railway line on Broadway to this car barn. For convenience, we will number them from the north, 1, 2, 3, 4, the south track, No. 4, being the one on which it is claimed the accident occurred. This barn faces to the west, and there are sliding doors in the barn over each track large enough to permit a car to pass through and enter the barn. In the large door, over track 4, there is cut a small door in the north half of the large door. This is for the purpose of enabling people to pass in and out of the barn without opening these larger doors.

For about three years prior to the accident, plaintiff had been in the employ of the defendant as car repairer. His usual work was at the shops about three-quarters of a mile from this barn. He, however, during that time had been frequently called to this barn to make repairs. About nine o'clock on the 4th day of January, 1911, the plaintiff was requested by the defendant to come to this car barn and take charge of it in place of the foreman. About 12:50 A. M. on the morning of January 5, 1911, the plaintiff was at his desk in this barn looking over the report of the motormen, and engaged in and about his duties, when he heard a car approach, and went to the small door over track 4 (this being the south track), and was about to open the door when a street car, driven by defendant motorman, Hartman, crashed into and through the door, pushing it in, and pinned plaintiff against another street car standing some two or three feet inside the door. The car that ran into the barn was a single-truck street car, under 32 feet in length, weighing about 8 tons. It was equipped with the usual controllers for throwing off and on the electric current and for reversing the car, and had a standard hand brake which operated upon four wheels, but the car did not have any sand equipment thereon, nor did it have an air brake. This car, operated by Hart-

man, was brought over these tracks from Broadway, for the purpose of housing it in this barn.

The evidence tends to show that after Hartman left the main line and entered upon these tracks leading to the barn, and after the conductor, Dougherty, threw the switch on the Broadway line, the car then proceeded to the next switch, passing over a track curving south and west, and there stopped while the conductor opened the switch. The next switch was open, and he went through that and stopped between the second and third switch. The conductor opened the third switch and he went through upon the line of the fourth track. As they got near the barn, the conductor got off and walked ahead to open the door, probably 8 or 10 feet ahead. The motorman attempted to stop the car and found the wheels were slipping, and then attempted to stop it by reversing the power. The last switch is about 140 feet from the barn. When he got within 30 or 40 feet from the barn, he noticed that the wheels were sliding. He then threw off the brake and reversed the current. There is no evidence that the track was slippery at any other point that night, or that the motorman had any trouble with the car slipping on that evening prior to this time. It appears that this track from Broadway to the barn is a level track; that, after the car left the last switch on its way to the barn, it was running from three to four miles per hour.

There is no controversy as to the fact that plaintiff was injured by being crushed between the car in question and the car inside the barn. There is no question in this case as to any contributory negligence on the part of the plaintiff. The charge of negligence made by plaintiff against the defendant, and as submitted to the jury, is substantially as follows: A failure to put sand upon the track when this car approached the barn at a point where the car was compelled to stop, and in failing to equip the car which caused the injury with a sand box or sand equipment so that sand could be put upon the track by the motorman; and in operating

this car without sand or sand equipment upon a slippery track at said place and at too great a rate of speed, in view of the condition of the track and the lack of sand or sand equipment as aforesaid. There was a general denial of negligence on the part of the defendant. Upon the issues thus tendered, the cause was tried to a jury, a verdict rendered for the plaintiff and judgment entered upon the verdict, and from this defendant appeals, assigning error on the part of the court.

In consideration of this case, we will not review the alleged errors in the order in which they are set out in defendant's brief. Defendant assigns twenty-nine errors. The first seventeen errors relate to the admission and rejection of testimony. The eighteenth error assigned relates to the action of the court in refusing to sustain defendant's motion for an instructed verdict. The balance of the errors relate to the action of the court in giving certain instructions on its own motion, and in refusing certain instructions asked by the defendant, together with the complaint that the verdict is grossly excessive and is the result of passion and prejudice.

At the conclusion of all the evidence, the defendant moved the court to direct the jury to return a verdict in favor of the defendant, on the ground that the evidence failed to show any actionable negligence on the part of the defendant, and that the evidence affirmatively showed that the defendant was not negligent in any of the matters charged against it by the plaintiff in his petition. The court having overruled this motion, and error being predicated upon the action of the court in so doing, we will consider this assignment of error first.

It appears that the street car was operated by one Hartman; that it was a single-truck car, less than thirty-two feet long and weighing about eight tons; that the track from Broadway to the barn was practically level; that this night was cold; that there was no snow on the ground, but the air was hazy and frosty.

Hartman testified that he took charge of this car somewhere between four and five o'clock in the afternoon preceding the day of the accident, and had operated it continuously up to the time of the accident; that it was in good working order; that he did not discover that the rails were slippery at any time preceding the accident; that the car began to slide after he attempted to stop it at the barn; that that was the first time he noticed that the rails were slippery; that he observed nothing that called his attention to the fact that the rails were slippery until he discovered that the car was sliding towards the barn after he set the brakes; that after he discovered this he let the brakes off, reversed the power, but still the car slid into the barn; that he was about 20 feet from the barn when he reversed the power. He says he might have been a car's length; that he did not notice closely on that point. He says he slid a little before he reversed the power; that there were bright lights at the barn, a cluster at the corner. He saw the barn doors were closed when he turned off the main line, and as he approached the barn. After he turned off the main line, he was running three or four miles an hour, but supposed he had perfect control of the car. He had one hand on the controller and one hand on the brakes. He says that after the conductor opened the third switch he went right up the line on track 4; that the conductor rode. As he got near the barn, the conductor got off and walked ahead to open the switch, probably 8 or 10 feet ahead. At the time the conductor got off, he was reversing the car. He attempted to stop it by reversing the power after discovering the wheels were sliding. He said the rails on a street railway track were likely to be slippery, if it was just commencing to rain or if the frost was just going out or freezing out; that the slippery condition of the rails is produced by weather conditions. Some days, he says, they find slippery rails; other days, not. When the weather conditions are right, they find it on part of the tracks. It depends upon the weather a good deal. Cannot tell

whether you are going to find a slippery rail on a cold day. He says he does not know of anything further he could have done to stop the car that night. After he discovered the wheels were slipping he did everything he could; that, ordinarily, on a dry rail, by the application of a hand brake, you could stop a car in six or eight feet, when running three or four miles an hour. There isn't much difference in stopping on a dry rail or a sanded rail.

Robert Davidson, called for the plaintiff, testified:

"I was standing at the desk, about eight feet south of this door. Saw nothing until I heard the crash. The door was smashed in the center and came right in, and Doran was pinned between it and the end of the car standing inside of the barn."

Scott Lamb, called for the plaintiff, testified:

"I am superintendent of the defendant company. Have been since last December. Have charge of the motor power department, operating department, power plant, substations, tracks, bridges and buildings. When I heard that Doran was injured, I went to the car barn on a local car which I ran myself. The car ran in on track 4 and stopped right behind the car that smashed into the barn. I bumped into it. The reason I bumped into the car was the slippery rails. I do not know how far back they extended. The night was dark and cold and hazy. It had not been so cold in the day, but it was getting colder. At the time of the accident it was quite cold. I don't think there was any wind. It was rather hazy and frosty. I did not notice any slippery track until I bumped into this car. I tried to stop the car and the wheels slid. They did not revolve. My car at the time had been moving about three miles an hour. On an ordinary rail I could stop within a few feet. I had concluded to stop about six feet from the car. The momentum of the car caused it to slide after the wheels were locked. I have seen frost settle when the rail

would not be slippery. A slippery rail is not uncommon. It is recognized in the street railway business, and we sometimes have slippery rails in the winter, and when we do, after the wheels are set with a brake, the car will skid from its own momentum. How far it will slide depends on how fast it is moving and the grade."

A. W. Bottine, called by the plaintiff, testified:

"I had been on duty that night from 5:00 o'clock until about 12:15, when I took my car in the barn. I had not noticed or observed the condition of the tracks that night until after the accident, I then observed that the rail was slippery. Especially, when I saw Lamb's car come in after the accident. I saw him coming. The switches were lined for him. He came real slow and ran his car within eight or ten feet of the other car; applied his brakes, but the car kept on sliding, and hit the Hartman car. The brakes on the Hartman car were set tight, and Lamb's car gave it quite a jar. Lamb was not running, at the time, over a mile an hour."

He was asked this question:

"What do you know about the matter of sanding the rails on slippery places and on inclined places, around through the city of Waterloo prior to that time?" A. "Well, there had been sanders out. Men to sand the rails at curves, slippery rails on pavement and railroad tracks. I don't think I saw any out that day. I have seen them at other times. I had not observed any slipperiness on the tracks. I was conductor. However, I knew my motorman had occasionally slipped past passengers who complained that they couldn't get on the car."

Robert Davidson, called for the plaintiff, testified as follows:

"I have been a motorman five and one half months on defendant's lines. It is very difficult for a motorman to tell by looking at a track ahead whether the wheels will slide, and it is impossible to tell whether they will slide when the brakes are set, unless you have been over the track. The only way I know of learning whether the rail is slippery is when the wheels actually slide after the brakes are set. How far it will run depends upon the speed. Sometimes a rail is so slippery it is almost impossible to stop. I know of no other method used by defendant to make the rails so that the car could stop on them when they became slippery, except by using sand. When they were found slippery this fact was reported to the company, and the company sanded them if it was a dangerous place. This is the only way I know of by which the company could have knowledge of the condition of the track."

W. A. Miller, called by the plaintiff, testified that he lived in Davenport. Was formerly in the street railway service in Davenport. Had been so engaged for about seven and one-half years. Was familiar with the method employed by street railways in sanding tracks. He was asked this question:

"Describe these different methods. A. There is a rule with all street car companies to take care of the rails. That is, it is that the cars are in good condition, you know. But on grades and hills, where they go down and up grade, it is a rule to have a man sand these tracks with a spoon or a shovel out of a pail. Q. Then what other way is there of sanding the tracks? A. They use a small sandbox on every car, having boxes on each end of the car. When the man fails to sand these spots—suppose it is in the morning early before the man is out—they have a pail and they use this sand by turning on a little faucet here, just the same as you would turn on a water faucet. The faucet is just to the right of the motorman. He has got his brake and his controller on

his right hand, and this little faucet is right there where he can loosen his control handle and turn on the sand. There is a little rubber tube that runs down and sands about so close to the track, and it throws a little stream of sand on the rail, perhaps as large as my finger. Q. Then what other devices have they used in the last five or six years in sanding the tracks? A. They use a small box, only it is a more modern pattern, a device so there is more pressure to the sand to get it out faster. The pressure is applied by air connected with the air brake. To stop a car on a slippery track, the first thing is to reverse the power; the brake cuts no figure until the motorman has done that. Then the motorman gradually throws on a brake so as to give the wheels a chance to act from this reverse and the sand, and then the current reverses it. The throwing of the brake does no good until you get sand on it. These sand devices that I speak of, that use air power, cannot be used upon cars that are not equipped with air. Davenport is the only place where I worked on street railways. That is a hilly town and the grades are steep. When the weather was bad and there was a little snow or dampness to make the rails sweat, then the sand man had to sand these grades. There was no necessity of sanding on level tracks. It was only upon the grades. It did not require sanding upon the track upon a level grade to stop a car with a hand brake upon an ordinary rail. A motorman might find a dry rail upon one part of the track, and in the next block a slippery rail. It is impossible for him to tell in advance where he will find a slippery rail. The only way is by stopping on a slippery rail. The only cars that I am familiar with, other than the Davenport line, is the I. & I. Interurban, whose lines end at Davenport. The I. & I. cars are double-truck cars, with extra heavy pressure of air."

O. S. Lamb, superintendent of defendant company, for and in behalf of the defendant, testified touching this matter:

"I have had some experience as a motorman. Some of the single-truck cars on defendant's road were formerly equipped with sand devices. The equipment was taken off, most of it prior to my employment. I took some off after I came to the company. The sand equipment was taken off of practically the same type of cars as car 45, the one that caused the injury. The cars from which the sand equipment was taken were equipped with the same kind of brakes as car 45. It was taken off because it was never used. The reason it was never used was because it was not practical. We had too much trouble with it. It was impossible to keep the sand dry; though dried and put in boxes, it would collect moisture, and the pipe from the sand box to the rail would get stopped up, and would not work at times when the motorman depended upon it. There was more likelihood of trouble with it than without it; it was never ready when wanted; there was no way to keep it dry. There is no way on a gravity sander to keep the sand dry and have it work. In a gravity sander the sand runs from its own weight from the pipe to the rail. In air sanders the sand is blown by air pressure from the air trap into the pipe, and then onto the rail. Our interurban cars are equipped with air and air sanders. Sand is not necessary on a level grade. On level grades, such as we have in Waterloo, we do not use it on our street cars. We use sand at certain places on the rails. It is a necessary thing to put it on the rails in places in some manner. That is because we sometimes have slippery rails and cannot stop without sand. When you come to a stop, and the wheels are locked with a brake, if the track is slippery, the car may run fifty or it may run one hundred feet. The slippery condition is caused by weather and changes in weather, and it cannot be anticipated; the frost or dampness comes and you have got a slippery rail. When you have a slippery rail and you want to stop the car on a grade, you have to sand it. If the wheels are locked on a slippery rail at a place where the track is level, the car will slide, but if the brakes are not wound up

tight enough to lock, a little more time in stopping is taken. The car will stop all right on a slippery rail, but if the motor-man runs on a slippery rail and locks his wheels by the brake, he will slide even on a level track. The tracks in front of the car barn were in an open space, and were affected by weather, the same as the rest of the track, and at times would get slippery. These tracks were used by many cars every night, which had to stop before reaching the barn, after they had left the main line. Ordinarily, the cars had to stop after they passed through the last switch before they got into the barn."

This witness, further speaking of the gravity sanders which had been taken off the cars, said:

"The sand boxes were inside the car in the dry. The cars were heated with electricity. When we put the sand in it was dry, and the pipes were cleaned out. When we first put it in, it would run out all right. The boxes would hold about two buckets of sand. It would last something like a week or so. The cars were run in all sorts of weather and would get damp. We had a dryer for it before putting it in. It ran through a pipe with a two-inch opening in the top and a three-quarters inch at the bottom. I would consider that a proper pipe. It didn't tend to pack the sand. The pipe did not run full of sand. I never tried to have the sand taken out each night and dried and put back for the next day, or even three days. Never tried to refill the sander every morning with dry hot sand. After we took these sanders off, whenever there was a place that needed sanding, the motor-man would report it and we would sand it. We had a man for that purpose. They never went out unless we sent them. When we directed them to sand, it was their duty to, and they did, sand the tracks. There were only two places where we deemed it necessary to sand when the weather conditions required it. One of these was the Illinois Central crossing on Water street. It was down grade to this crossing. The view

is shut off. The crew cannot tell when a train is coming. We keep it sanded on account of emergencies. The other is the ticket office in which are the main waiting rooms. People congregate there. The cars are stopping, coming in and going out. Someone is likely to step in front of the cars. These places are sanded when they are getting slippery. I deem the cars safer without these gravity sanders on a level track because the motorman depends upon the sand in case of an emergency. If a motorman relies upon the sand to stop, and the sand doesn't work, he is lost, he is going to get hurt. You can rely on air sanders ninety per cent of the time. A motorman who doesn't have sand approaches a place of danger with his car under control. It is impossible to tell whether tracks are slippery until the wheels slide. Our tracks in front of the waiting or ticket room are level, and we use sand there, because we have to stop suddenly. Sand was kept at the waiting station, at the shops, and at the car barn. It was brought from the dryer at the shops. I knew the tracks in front of the barn were unused except as the cars finally came in to go into the barn. I knew the tracks lying outside would be covered by frost in the course of one-half or one hour, and that frost sometimes makes the rails slippery. I didn't direct anyone to sand these tracks."

James M. Maxey, testifying for the defendant, said:

That for twenty years he had been connected with the Des Moines City Railway Company. During the first ten years was motorman. Since then has been assistant master mechanic; that during the ten years he was motorman he had experience in operating sand devices on cars; that "at the present time all Des Moines cars are double-truck cars, and on all cars where they have air brakes they use air sanders; on others the hand or foot sanders. The foot sander consists of a bowl which sets inside of the car and holds a couple of pails of sand. It tapers at the bottom where there is a sliding valve to which there is a rod attached. The other

end is attached to a lever above the floor. When the motorman steps on the lever it pulls the slide. A spring returns the valve to its place. There is another kind of valve on a foot sander which consists of a ball which is raised by a lever. The greatest drawback to the sander is that the end of the hose that follows the rail is bound to get damp on a drizzly day, and if it gets damp two or three inches up the spout, the sand clogs and it won't work, but the motorman can knock it out with a switch rod by hitting the hose. A wire hose is generally used. It is the slushing up from the bottom that wets the hose. Quite frequently a motorman relies upon his sand, and it doesn't work, where if he didn't rely upon it he would take a little more time to stop. We have been experimenting with these gravity foot sand devices for fifteen or sixteen years. We now use them solely on double-truck cars. These sanders fail when we need them most. They fail in rainy wet days, when there is dampness. From my knowledge, the use of gravity sanders on cars like the one in question, I would say that the sander is so unreliable that such cars would be safer in operation when not equipped with such gravity sander. Sand is very essential on a grade or a hill or a slippery place, where you have to stop. There should be sand if you can get it there. The reason we experiment with sanding devices is to get something that we can depend upon. The Des Moines Company run one hundred cars, and all have sand equipment, or, rather, we have tried to have sand equipment. We didn't always get it to work. Excepting on light open-face cars, Des Moines has used sand equipment for the last fifteen years. All double-truck cars had sand equipments until a year ago. The company doesn't use any single-truck cars without equipment. When I commenced with the company twenty years ago, thirty of those cars didn't have sand equipment. During the last fifteen years the single-truck cars did have sand equipment and we aim to keep sand in the box, and when it wasn't stopped up we used it. A motorman cannot always tell when it is stopped up. The air brake is the

most modern invention for heavier cars. Des Moines has no single-truck cars in operation at the present time. Des Moines is a very hilly town. There are still a few cars, equipped with air brakes, on which we are still using the gravity sander. We do not sand the level tracks in Des Moines by hand at all only on the hills."

F. J. Hanlon, called for the defendant, testified that he was manager of the Mason City & Clear Lake Railway Company, and had been for fifteen years; that it was an interurban road. He said he had run lots of electric cars but never worked as motorman. He said it was his opinion that single-truck street cars should not be equipped with sanding devices; that it tended to careless operation, but said a good many street railway companies used sand equipment; that his company used it on heavier cars; that some of the sand equipment was air and some gravity; that they removed the sand equipment on the light cars some thirteen years ago. He didn't think there had been any improvements since; that the foot sanders on the heavier cars are very similar to those that were taken off the light cars. The sanders operated very similarly on the two classes, the light and the heavy, and the purpose of the sand in each is the same; that they kept them on the big cars because they were harder to stop. He says he recognizes that sand is necessary for safety in the operation of street railways at certain places, and it is simply the best way of getting it there. The purpose of sanding a track is to keep the wheels from slipping; that the car will stop quicker if sanded.

This is practically all the testimony that was offered and admitted, touching the use of sand and sanders on street railway tracks, and this is the testimony on which the jury was permitted to say whether or not the failure, on the part of the defendant, to use sand on its tracks at the point in question, or to place sanders upon its cars, was actionable negligence rendering the company liable for the injury sus-

1. MASTER AND SERVANT: safe place to work: sanding street car tracks: negligence.

tained by the plaintiff under the circumstances detailed in this case.

The only statute in force at the time of this accident touching the use of the sanders upon street railways was Chapter 52 of the Acts of the 33d General Assembly, which reads as follows:

“Every . . . company . . . operating a street railway in this state shall equip every double-truck passenger car of thirty-seven feet and more in length over all, or weighing thirty-five thousand pounds or more, purchased, built, or rebuilt hereafter, with power brakes other than hand capable of bringing such car to a stop within a reasonable distance, together with equipment for sanding rails of any street railway, which brake and sand equipment shall be controlled and operated by the motorman on said car.” (A violation of this section is punishable by fine.)

Chapter 38 of the Acts of the 34th General Assembly was not passed until after this accident occurred, and is, therefore, not to be considered in determining any duty of the company in respect to the matter in controversy, but neither of these statutes attempts to regulate or control the duty of the operator of a street railway in respect to cars such as the car in controversy here. There was no statutory duty resting on the defendant, at the time of this accident, to place sanding devices upon cars of the character of the one that caused the injury. Chapter 38 of the Acts of the 34th General Assembly only relates to cars of over thirty-two feet in length. This car, the record shows, was under thirty-two feet in length. In failing to place sand upon the car in question, the company, therefore, did not violate any duty imposed upon it by the statute. If it can be held liable at all for its failure to sand the tracks, or to place sand devices upon the car, it must be found in its common law duty to its employees, to furnish them a reasonably safe place to work and reasonably safe

appliances with which to perform the work. At common law it was the duty of the master to exercise reasonable care to furnish the servant a reasonably safe place to work, in discharging the duties imposed upon him by the master.

There is no question in this case that the plaintiff, at the time of the injury, was in and about his master's business, at the place and in the place designated by the master in which to perform the services required of him. He was exposed to hazard from incoming cars in the event the rails became slippery. This might be considered a hazard incident to his employment, providing, however, the master, by the exercise of reasonable care for the safety of the servant, could not have removed the danger. Negligence always presupposes a duty. The duty here that rested on the master was to exercise reasonable care to furnish the servant a reasonably safe place to work. These cars came and went by the direction of the master. They were brought to this barn and housed in this barn by the direction of the master. These tracks were laid and these doors prepared and made for that purpose. Behind these doors and in front of these tracks, the plaintiff was required to work. The evidence discloses that these tracks were exposed to weather conditions; that these tracks, under certain conditions of the weather, became slippery and cars were liable to slide and slip, and the motorman lose control.

The jury might well have found under this record that reasonable prudence and care require that these tracks be sanded at the point where the motorman was required to stop before entering the barn; that ordinary care on the part of the master required this to be done for the safety of the servant. It appears that tracks exposed as these were on that night, under the weather conditions that existed, do become slippery, and when they do, the car in the hands of the motorman passes beyond his control; that the devices provided by the company for stopping the car were not reasonably sufficient against the known effect of the changing weather conditions at that season of the year and at that time of the

night. The master is chargeable with knowledge that climatic influences occasionally will produce conditions which are apt to endanger the safety of the instrumentalities which are reasonably secure in normal weather.

Whether under all the circumstances disclosed here the defendant company was negligent in not anticipating that these rails might become dangerous through climatic influences upon them, and in not providing against it, is not a question of law but a question of fact, and is, therefore, for the jury. See *Shumway v. Burlington*, 108 Iowa 424, 427; *Balhoff v. Ry. Co.*, 65 N. W. (Mich.) 592.

It is no answer to say that the master did not know that climatic conditions *had* produced changes which imperiled the servant. There is still a question whether or not the master, by the exercise of reasonable care for the safety of the servant, could and should have known of the existence of the dangers, so that by the exercise of reasonable care and thoughtfulness for the servant's safety he might have remedied the condition by the exercise of reasonable diligence before the disaster.

It is true that the master, in providing for the safety of his servant, is not required to anticipate and guard against every possible danger. He is only required to use such reasonable care, take such reasonable precaution to prevent accident or injury, as a reasonably prudent person would take or adopt to avoid the danger. The duty which the law imposes upon the master is to use ordinary care and supervision of the instrumentalities employed in or about which the servant is required to work, so as not to unreasonably or unnecessarily expose the servant to hazards which reasonable foresight could have anticipated and reasonable care guarded against.

We think, under the showing here made, that the court did not err in overruling defendant's motion to instruct the jury to return a verdict for the defendant.

We next come to consider whether or not the court erred in the trial of the cause, and in the making of the record upon

which the case was finally submitted to the jury. The first contention of appellant relates to the action of the court in receiving evidence over the objection of the defendant, and in refusing evidence offered by the defendant claimed to have been pertinent to the issue. Upon this question appellant assigns seventeen distinct errors. A careful re-reading of the entire record satisfies us that there was no error prejudicial to the rights of this defendant in the first fifteen errors assigned, for the reason that every matter sought to be elicited by the defendant from its witnesses, and to which objections were interposed and sustained, was fully brought out in other portions of the same witness' testimony, and the error, therefore, in sustaining the objection, if error, was not prejudicial to any rights of the defendant in this cause.

The defendant's next complaint is that the court erred in permitting plaintiff's counsel to read from the deposition of one Dougherty. It appears that sometime prior to the trial the plaintiff had taken the deposition of Dougherty, and that this deposition was on file in the clerk's office at the time of the trial. This trial was commenced on the 16th day of April, 1912. For some reason which is not apparent in the record, witness Dougherty was present in the court room at the time of the trial. This precluded plaintiff from using his deposition, so he called Dougherty on the stand in rebuttal, and the record thereupon disclosed the following:

In answer to questions propounded by plaintiff's counsel, Dougherty answered: "I live at Waterloo. Am street car conductor, and have been for about seventeen months. I was conductor the night Doran got hurt. I never operated a car on this track before I was conductor." Q. "Now then, when you were conductor on that line, I would ask you whether or not it is true that the only places sand was put upon the tracks was at the Illinois Central crossing and the waiting

2. APPEAL AND
ERROR: trial:
exclusion of
evidence
otherwise
brought out.

8. WITNESSES:
ancient rule
against im-
peaching one's
own witness:
modification
recognised.

station?" A. "I cannot just think of anywhere else just now. My deposition was taken March 27th." Q. "To refresh your recollection, I will read this question." (Defendant objected to the reading of any part of the deposition as being incompetent, the witness having been produced by the plaintiff and put upon the witness stand. This was overruled.) Q. "This to refresh your recollection. I will read a couple of questions, and then no doubt you can remember better." Counsel for defendant said: "I want my objection there again to the reading and the ruling upon it by the court." (No ruling.) Plaintiff's counsel then read from the deposition as follows: Q. "In other words, did the company have a regular sand brigade that worked upon the track in different places from time to time?" A. "Yes, sir." Q. "How many men?" A. "Sometimes they had one, sometimes more." Q. "How would they operate? Would they ride from place to place on the car, I mean from a bad place here in one place and sand that up and then go to some other place where it needed sanding?" A. "Yes, sir." "Now after hearing that testimony that you swore to on the 27th day of March, I would ask you whether or not you can recall other places besides the place at the station and at the railway track?" (This was objected to by defendant's counsel and a motion made to strike from the record what had been read from the deposition by counsel for the same reason as urged before.) By the court: "Well, he may answer the question." A. "No, I cannot." Q. "You cannot remember any others?" A. "No, sir."

Cross-examination: "The two places that were sanded, as I remember, were at the Illinois Central crossing and just east of the Fourth street bridge, and at the waiting station."

It is apparent from this record that Dougherty was in the employ of the defendant company at the time of the accident and at the time of the trial; that plaintiff had taken his deposition on the 27th day of March. It is not urged, nor have we any reason to assume, that the witness did not in that

deposition testify substantially as read by counsel. Assuming that he did, it is apparent that he had changed his attitude, to the surprise and disappointment of counsel. His presence in the court room is not accounted for. It, however, prevented the plaintiff from reading the deposition to the jury as substantive evidence of the facts therein related. The witness was not called by the defendant, although the testimony given by him upon this trial is quite in accord with defendant's contention, and against the contention of the plaintiff. Counsel for the plaintiff, taken no doubt by surprise, resorted to the deposition for the purpose of refreshing the witness' memory from the deposition itself.

This deposition, we must assume, was taken in good faith by the plaintiff for the purpose of use upon the trial, and for the purpose of producing evidence as to the substantive fact therein inquired about. Counsel, lulled into security as to what this witness would say on this point, and having every reason to believe that his testimony would be in accord with the other testimony given by him, and by plaintiff's other witnesses, called him to the stand. For some reason, which the record does not fully explain, but which may be inferred, the witness changed front. His testimony on the stand absolutely contradicts the statements made by him in the deposition. His testimony given on the stand supports defendant's contention and rebuts plaintiff's. Defendant has the benefit of his testimony so given for what it is worth. Does reason or fairness suggest that the door should be shut on the plaintiff, that the plaintiff should be held bound by this testimony, without an opportunity to explain the circumstances under which he was induced to call the witness as his own? Should he not be permitted to point out the manner in which the pit was dug into which he fell? To hold a party bound by testimony so fraudulently imposed upon him would be a travesty on justice, and would make the rule, that a party cannot impeach his own witness, a door through which wrong or error may enter and truth be shut out. When it is so apparent in

the record that plaintiff's counsel was trapped by the witness into placing him upon the stand, the rule that prevents the introduction of statements, contrary to his testimony given on the stand, ought to be, in some degree at least, relaxed; that is, where one induces the other to place him upon the witness stand in the belief, founded upon his previous statements, that he will testify to a certain fact as existing, and then when called flatly denies the existence of the fact, the party ought not to be held bound by his testimony without an opportunity to expose to the jury the conditions and circumstances and the facts which led up to the calling of the witness. We are not without authority on this point in this state. All counsel tried to do here in this case was to refresh the witness' memory by calling his attention directly to the former testimony given by him, which was on file in the cause at the time, but which plaintiff was not permitted to use as substantive testimony.

In *Hall v. C. R. I. & P. Ry. Co.*, 84 Iowa 311, a condition such as we have here confronted the court. In that case, the plaintiff, for the purpose of proving his theory of the case, called a witness named Collins. Collins, when examined, testified to a state of facts diametrically opposed to the theory upon which plaintiff rested his case, and to establish which, Collins was called. The plaintiff then produced a written statement signed and sworn to by Collins, and the witness was asked whether he did not sign this writing, which was read to him in the presence of the jury. The witness first denied that he signed it, and then finally admitted that he did sign it. He was then asked if he did not state to other parties certain facts, which were in the line of plaintiff's contention, and he answered both questions in the negative. Error was assigned upon the action of the court in permitting the plaintiff to cross-examine this witness in this way after he had been called for and in behalf of the plaintiff. The court said: "It is the general rule that a party cannot impeach his own witness by introducing evidence

which tends to show that he is unworthy of belief. . . . When a party is surprised by the testimony given by his witness, the attention of the latter may be called to the time and place where it is claimed he made contrary statements. This is not for the purpose of laying the foundation for impeachment, but to probe and quicken the recollection of the witness, and to give him an opportunity to correct his testimony, if it is erroneous, and to show that it has surprised the party who called him (citing authorities). The district court was within the rule in permitting the examination of Collins as to the statements he had made and the paper he had signed." See also *Humble v. Shoemaker*, 70 Iowa 223; *State v. Cummins*, 76 Iowa 133; *Spaulding v. C. St. P. & K. C. Ry. Co.*, 98 Iowa 205; *State v. Walker*, 133 Iowa 489.

The general doctrine here under consideration is very aptly put in 30 Am. & Eng. Encyc. Law, 1130, under the head, "Party Entrapped by Hostile Witness," in which it is said:

"It frequently happens that a party is entrapped into calling a hostile and unscrupulous witness, who has given one account of a state of facts before the trial, but gives a materially different account on the witness stand. This circumstance has given rise to much discussion, and no little contrariety of opinion, as to how far a party thus surprised and deceived may impeach such a witness by proving his statements out of court. If a witness unexpectedly gives material evidence against the party who called him, such party may, for the purpose of refreshing the memory of the witness and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement"—citing authorities.

Under the heading, "Proof of Prior Inconsistent Statements," we quote from the same authority as follows:

"Thus far the authorities are agreed, but the question is, should the inquiry stop here. If the witness admits that

he has made a contrary statement, there is, of course, no necessity for other evidence of it, and, according to many weighty decisions, if he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses where it would not be admissible as independent evidence, and can, therefore, have no effect but to impair the credit of the witness with the jury. On the other hand, it has been urged with much reason that a party should not thus be placed at the mercy of a designing witness, and there are many cases in which it is held that where a party has been surprised and entrapped by his own witness, the court may, in its discretion, allow him to call other witnesses to prove that such treacherous witness had previously made statements contrary to his testimony, not for the purpose of proving the truth of such previous statements, but to show the treachery of the witness, and to set the party right before the jury. To this effect is the great weight of modern authority."

So it is apparent that many courts have adopted a broader rule than has been recognized in this state, and a broader rule than we are required to invoke to sustain the action of the court in the instant case. We think there is no reversible error in the action of the court in permitting the reading of this deposition, under the facts and circumstances disclosed in this case, and in view of the purpose for which it was used.

The defendant next complained of the action of the court in giving to the jury instructions 3, 7½, 8 and 9.

4. TRIAL: instructions: stating grounds of negligence: non-necessity to repeat.

To intelligently consider instruction 3, it is necessary for us to go back to the instructions given by the court in which the issues were stated to the jury upon which the cause was submitted. Instruction 3, complained of, reads as follows:

"Before the plaintiff can recover in this action, it must be proven by the weight or preponderance of the evidence introduced upon the trial: (1) That the defendant was negligent in some one or more of the respects alleged by plaintiff, and that by reason thereof, plaintiff was injured substantially in the manner and at the time alleged by him."

The complaint of this instruction is that the jury was left to determine for itself in what respect plaintiff alleged that defendant was negligent, and it is said in argument that this instruction left it to the jury to search through the pleadings to ascertain in what respect the plaintiff alleged that the defendant was negligent. Now it is apparent that in many cases this complaint might be well taken, but it is elementary that the instructions must be read together. Reading this instruction in connection with the one next to the one immediately preceding it, the jury could not have misunderstood what the court meant when it said, "He must prove by the weight or preponderance of the evidence that the defendant was negligent in some one or more of the respects alleged by the plaintiff."

In its preceding instruction, the court said, in substance, that the plaintiff claims that the negligence of the defendant which caused his injuries consisted in this: A failure to put sand upon the track where it approached the barn where the car was compelled to stop, and in failing to equip its car which caused the injury with a sand box or sand equipment so that sand could be put upon the track by the motorman, and in operating this car without sand or sand equipment upon a slippery track at said place, and at too great a rate of speed in view of the condition of the track and the lack of sand or sand equipment. Surely, the court having stated the grounds of negligence upon which plaintiff predicated his right to recover, it was not necessary for the court to repeat those grounds in order that they might know what the court meant when it said that the plaintiff must prove that the

defendant was negligent in some one or more of the respects alleged by the plaintiff.

The court followed this instruction immediately by giving the jury a legal definition of what constituted negligence. We think there was no error here.

In the seventh instruction the court said to the jury:

“If you believe from the evidence that the injury to the plaintiff resulted to him by mere accident, and without any fault or negligence on the part of the defendant, then the plaintiff cannot recover in this action. The defendant is not an insurer of the safety of its employees, and it is only liable where injuries are incurred without fault on the part of the person injured, and because of negligence on the part of the defendant. The fact that plaintiff was injured is not, in itself, evidence which tends in the slightest degree to show that the defendant was negligent.”

5. TRIAL: In-
structions:
stating af-
firmative and
negative
proposition:
sufficiency.

In instruction 8 the court said to the jury:

“The defendant is not bound to equip its cars with the best or latest appliances, but it is defendant’s duty to furnish appliances such as reasonably prudent men provide under similar or like circumstances. It is for you to say from the evidence which has been introduced upon the trial whether or not, under the circumstances and conditions disclosed by the evidence, the defendant, in the exercise of reasonable and ordinary care and diligence, should have had this car equipped with a sand box or sand equipment so that sand could have been put upon said track by the motorman, or should, on the night in question and before the injury, have in some way caused sand to be put upon the track at the approach to said barn. If you find from the evidence that the defendant should have done so, and that the injury to the plaintiff was caused as the direct and proximate result of defendant’s failure to do so, and that plaintiff was not himself guilty of

contributory negligence, as explained elsewhere in these instructions, then the plaintiff is entitled to recover in this action; otherwise not."

By the use of the words, "otherwise not," the jury must have understood (assuming that they had a reasonable understanding of the English language) that, if they found from the evidence the converse of the proposition above stated, then their verdict must be for the defendant.

It must be borne in mind that instructions submitted to the jury are given for the purpose of guiding the jury in the discharge of its duty *under the record made*. There is no contention in this case that this car had sand boxes; there is no contention that the defendant had put sand upon the track at the place where the car approached the barn, or that any provision was made that night for sanding the track at that point, either from the car or otherwise. Indeed, the evidence completely negatives any such suggestion. Therefore, the only question for the jury to determine was, as the record then stood, whether or not, under the circumstances and conditions disclosed by the evidence, the defendant, in the exercise of reasonable care for the safety of its employees in the barn, should have had its cars equipped with sand, or should have caused sand to be put upon the track at the place where the car approached the barn. The court said to the jury that if they found that reasonable and ordinary care for the safety of the employees required the company to put sand upon the track (it being admitted that it did not do so), and that this omission was the proximate cause of plaintiff's injury, then the plaintiff was entitled to recover; but that if, under all the facts and circumstances disclosed, reasonable care for the safety of the employees did not require the company to put sand upon the track, either through the instrumentality of cars or otherwise, on the night in question, and at the place where the car approached the barn, then the plaintiff could not recover, even though the failure to do so was the proximate

cause of his injury. This is the simple meaning of the eighth instruction. It gave the jury a correct guide in the application of the facts as they were in the record.

The ninth instruction, complained of, reads as follows:

“Under the evidence, it was the duty of the motorman, Hartman, to approach the barn with his car under control so that he could make a reasonably quick stop at any time after he left the line on Broadway, and before he reached the barn, and if said motorman failed to perform this duty, and if plaintiff was injured as a result of the negligence of said motorman alone, and without any fault or negligence on the part of the defendant company, then plaintiff is not entitled to recover, and in that event, your verdict should be for the defendant. If, however, the motorman, Hartman, was negligent and the defendant was also negligent, as alleged by plaintiff, and if plaintiff, without contributory negligence on his part, was injured as the direct and proximate result of the concurrent negligence of said Hartman and defendant, then plaintiff is entitled to recover.”

This instruction is criticised because the court said to the jury that, if the plaintiff was injured as a result of the negligence of the motorman alone, and without any fault or negligence on the part of the defendant company, plaintiff is not entitled to recover; and from this it is argued that the court impliedly said to the jury that if any cause, in any way, without any negligence on the part of the defendant, concurred with the negligence of the motorman in causing the injury, the company would be liable; that is, although the company was not guilty of any negligence on its part, if other causes than the negligence of the company concurred with the negligence of the motorman in causing the injury, the defendant is liable. There would, of course, be no liability on the part of the company if the injury was the result of

6. MASTER AND SERVANT: concurrent negligence of fellow servant and master; statement of rule: instructions: hypercritical objection.

the negligence of the motorman, for he was a fellow servant with the plaintiff. The master is not liable for the negligence of a fellow servant, and, therefore, if there were other causes concurring with the negligence of the motorman, the defendant would not be liable, unless it was responsible for the other concurring cause. The criticism is not just. This part of the instruction presents the negative proposition that, if the company was not at fault, or not negligent, and the jury found that the motorman was negligent, and that his negligence was the proximate cause of the injury, the plaintiff could not recover. The jury are distinctly told in the last part of this instruction under consideration that, if the motorman was negligent, and the company was negligent, as charged, and the injury was the proximate result of the concurrent negligence of both, then the plaintiff is entitled to recover; that to hold the defendant liable, they must find that the company was negligent, and that this negligence was the concurring cause, with the negligence of the motorman, in producing the injury, and that the jury could not return a verdict for the plaintiff unless they found affirmatively that the defendant was guilty of the negligence charged, and that this negligence was a concurring cause in producing the injury.

It is claimed, however, that the instruction is not full enough, in that it does not state that the intervening or concurring cause which would render the company liable must be one that the company should, by the exercise of reasonable care, have anticipated or apprehended. But the jury had been told this before, and there was no occasion for repeating it. This instruction must be read in connection with all the instructions, and what was here said in this instruction must be construed and interpreted in the light of what preceded and followed.

We think there was no error committed by the court here that justifies a reversal of the cause. See *Walrod v. Webster County*, 110 Iowa 349, and cases cited.

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The ninth instruction, complained of, reads as follows:

“Under the evidence, it was the duty of the motorman, Hartman, to approach the barn with his car under control so that he could make a reasonably quick stop at any time after he left the line on Broadway, and before he reached the barn, and if said motorman failed to perform this duty, and if plaintiff was injured as a result of the negligence of said motorman alone, and without any fault or negligence on the part of the defendant company, then plaintiff is not entitled to recover, and in that event, your verdict should be for the defendant. If, however, the motorman, Hartman, was negligent and the defendant was also negligent, as alleged by plaintiff, and if plaintiff, without contributory negligence on his part, was injured as the direct and proximate result of the concurrent negligence of said Hartman and defendant, then plaintiff is entitled to recover.”

This instruction is criticised because the court said to the jury that, if the plaintiff was injured as a result of the negligence of the motorman alone, and without any fault or negligence on the part of the defendant company, plaintiff is not entitled to recover; and from this it is argued that the court impliedly said to the jury that if any cause, in any way, without any negligence on the part of the defendant, concurred with the negligence of the motorman in causing the injury, the company would be liable; that is, although the company was not guilty of any negligence on its part, if other causes than the negligence of the company concurred with the negligence of the motorman in causing the injury, the defendant is liable. There would, of course, be no liability on the part of the company if the injury was the result of

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It is claimed, however, that the instruction is not full enough, in that it does not state that the intervening or concurring cause which would render the company liable must be one that the company should, by the exercise of reasonable care, have anticipated or apprehended. But the jury had been told this before, and there was no occasion for repeating it. This instruction must be read in connection with all the instructions, and what was here said in this instruction must be construed and interpreted in the light of what preceded and followed.

We think there was no error committed by the court here that justifies a reversal of the cause. See *Walrod v. Webster County*, 110 Iowa 349, and cases cited.

The defendant complains of the action of the court in giving to the jury instruction 7½, which reads as follows:

“If you fail to find from the evidence that the defendant company had actual knowledge of the slippery condition of the track, or that, by the exercise of reasonable and ordinary

7. TRIAL: instructions: placing undue emphasis on certain evidence.

care, taking into consideration the weather conditions which ordinarily exist at that season of the year, it should have had actual knowledge thereof, such a length of time be-

fore the accident that it could, in the exercise of reasonable care, have taken steps reasonably necessary to prevent an accident, then the defendant is not liable for the injury received by the plaintiff, and in that event your verdict should be for the defendant.

“On the other hand, if you find from the evidence that the defendant did have, or by the exercise of reasonable and ordinary care should have had, such knowledge for such a

8. TRIAL: instruction inartificially drawn: test to apply.

length of time as above suggested, then the defendant was negligent, and if the injury to the plaintiff was caused as the direct and proximate result of defendant's negligence,

and if plaintiff was himself not guilty of contributory negligence, then the plaintiff is entitled to recover in this action.”

The defendant complains of the first paragraph of this instruction on the ground that it unduly emphasizes weather conditions in determining whether or not the defendant should have anticipated that the track was or was likely to become slippery; that in doing so the instruction ignored facts favorable to the defendant, such as that the tracks were level; that the rules required motormen to run slowly over them, holding the car well under control, and that there had been no prior trouble upon the track, etc. It is not contended by the defendant that if the jury failed to find from the evidence that defendant had actual knowledge of the slippery condition they might not then proceed to determine

whether or not, by the exercise of reasonable and ordinary care, it should have had such knowledge for such a length of time before the accident that, with reasonable care, steps could be taken to prevent the accident; that, in determining this, they might take into consideration the weather conditions which ordinarily exist at that season of the year; but the contention is that the court should have gone farther and called attention to other facts which might have had probative force upon the determination of this question, such as here before suggested.

The law which governs the rights of the parties and which is essential, under the facts in a case, to a proper determination of the rights, must be given to the jury fairly and fully, as a guide to them in reaching a correct result under the law. The law does not require that the rule be phrased in any particular way, nor that it be phrased with rhetorical and grammatical accuracy. The thought involved in a rule lies back of the expression of it, through the instrumentality of speech. Language is only for the purpose of conveying to the minds of others the thought existing in the mind of the speaker or the writer. Any language which conveys to the mind of the other a correct understanding of the thought, though inartificially and ungrammatically conveyed, is sufficient. A rule of law may be stated in various ways without impinging upon the rule. To one mind, a thought is conveyed more intelligently and clearly when phrased in one way. Another mind grasps it more intelligently when phrased differently. The real purpose in phrasing a thought is to convey to the mind an intelligent understanding of the thought. In instructing a jury, it is the duty of the court to lay down those rules of law which have been recognized and approved, and which are essential to a proper disposition of the rights of the parties. As evidence is the means through which there is conveyed to the mind the knowledge of the existence or nonexistence of a particular fact, so the instructions of the court are the instrumentalities through which

there is conveyed to the minds of the triers of the fact, a knowledge of the law by which they must be guided in determining the ultimate right. The law requires that these rules be correctly stated by the court, but does not require that they be expressed or phrased in any particular way. It is sufficient if, to a man of ordinary intelligence, a correct understanding of the law is given in the whole charge. It goes without authority to say that the statement of an incorrect rule or one that guides to a wrong conclusion is prejudicial. It goes without argument to say that the statement of inconsistent rules which lead to inconsistent conclusions when applied is error.

In the ordinary intercourse between men, the subject-matter of the controversy or discussion must be always kept in mind in interpreting the language used. It is quite impossible in conveying a thought to so extend and amplify the thought by expression that there could be no possible controversy as to the interpretation of the language used. What is said and what has preceded has much to do in determining what was intended to be conveyed by the speaker, and what was understood by the hearer. The hearer is presumed to have understood what was said in the sense in which men of ordinary intelligence understand such expressions, and presumed to have given the words used that interpretation which men of ordinary intelligence usually give to the language used. Never, however, in construing language must the subject-matter concerning which it was used be lost sight of,—what preceded and followed,—the knowledge the parties had of the subject-matter under discussion.

We are not disposed to reverse a case because the manner in which the rule is stated, or because the language used in stating the rule, when considered abstractly and apart from the record, might receive an interpretation other and different than that which the true rule requires. We cannot disassociate the instructions from the record then before the court and the jury, and consider it as a statement of an

abstract proposition of law. If the rule stated is a sufficient guide to the jury, as to the law that governs them in the particular case under the record made, it is sufficient for the purposes of the case, though not perhaps full enough to express the abstract proposition.

We find in this case no question as to the injuries received by the plaintiff. It is not contended that the plaintiff was guilty of any contributory negligence. The undisputed evidence shows that the tracks were slippery on this night. It shows that the condition of the tracks was due to climatic changes. It is shown that on damp, frosty nights rails, whether on the level or upon a hill, become slippery; that this fact was known to the defendant company; that when tracks are slippery cars will slip and slide forward in spite of any effort on the part of the motorman with the ordinary appliances to prevent their so doing; that the usual and ordinary method recognized for stopping cars, under conditions such as this record discloses, is by sanding the tracks.

On this particular night, this car was brought to the barn for the purpose of being housed. The doors to the barn were closed. Plaintiff was behind these doors engaged in and about the work assigned him. The jury could have well found, and, we have no doubt, did find, that if the motorman was in the least degree careless in approaching this barn without sand upon the tracks, the car was liable to push forward, after the brakes were set, into and against this door. As to all these facts, there is practically no dispute in the record. There was no sand put on this track and no provision made for sanding it. The plaintiff predicated the liability of the company and urged his right to recover upon the ground that the defendant had failed to sand these tracks at this point. This was the negligence charged, and this was the omission of the defendant upon which liability was predicated.

While this instruction is inartificially drawn and might have been amplified and made fuller, we do not find that it did not fairly express to the jury the rule that should govern

them upon the question there treated. The serious criticism urged against the instruction is lodged against the second division of the instruction, and it is claimed that the court undertook to tell the jury that certain omissions constituted negligence; that this was within the province of the jury to determine from all the facts. This is ordinarily true, but not always true. The court, in this division of its instruction, in substance said:

“On the other hand, if you find from the evidence that the defendant, by the exercise of reasonable and ordinary care, should have had such knowledge of the slippery condition of the track for such a length of time before the injury that it could, in the exercise of reasonable care, have taken steps reasonably necessary to prevent the accident, then the defendant is negligent under such circumstances in failing to take steps reasonably necessary to prevent the accident.”

Certainly that is true. Under any fair interpretation of the instruction, the court does not say that this is the actionable negligence charged, or that this is all the negligence necessary to be shown to create a liability. The court had already fully explained to the jury what the negligence charged was, and what acts or omissions to act constituted the negligence upon which plaintiff predicated his right to recover, and had told the jury that, unless plaintiff sustained by his evidence one or the other of those omissions or commissions charged as constituting actionable negligence, plaintiff could not recover, and the court proceeded in this instruction, “and if the injury to the plaintiff was caused as a direct result of defendant’s negligence, then the plaintiff is entitled to recover.”

We do not feel that the criticism of this instruction and the interpretation urged by the plaintiff is justified under the whole record. We believe, considering the whole record and the other instructions, the court fairly expressed the law which should guide the jury in its deliberation. Not only

must both parts of this instruction be read and considered together, but the whole record must be considered in determining whether or not prejudicial error was committed. While we feel that the instruction was inartificial, and not as full as it might be made, yet in view of the whole record we cannot reverse upon this ground.

It is next contended that the verdict is excessive. We cannot say that this verdict was the result of passion and prejudice. It has support in the evidence. We do not feel justified in reversing on this ground.

The judgment is, therefore,—*Affirmed*.

LADD, WEAVER, EVANS and PRESTON, JJ., concur.

DEEMER, C. J. (dissenting).—The majority, while condemning instruction No. 7½ given by the trial court, finally conclude that, although inartificially drawn, it was without prejudice, because of other instructions and because of the entire record in the case. I cannot in justice to myself concur in this view. Had the instruction been advisory only, and not intended to cover the entire case, I might be disposed to concur because of the other instructions in the case; but as it was not, it must be regarded as in conflict with other instructions covering the same point, and therefore erroneous. If an instruction purporting to cover the entire case is wrong, it cannot be cured by other instructions; for, in the absence of special findings, there is no method whereby to discover which instruction the jury followed; and, as the verdict may have been based upon the erroneous one, it should be set aside and a new trial ordered.

Under the facts of this case, there being no statute requiring the sanding of tracks or the equipping of the particular car in question with a sand box or sand equipment, it was wholly a question of fact for the jury to determine whether or not defendant was negligent in these respects, because of its failure to sand the track or to equip its car with a sand

box or other sand equipment. The majority concede that the statute relied upon by appellee does not apply to the case, because the car was not of the required size. The trial court would not have been justified in instructing, under the facts disclosed, that defendant was negligent, as a matter of law, because its car was not equipped with a sand box, or because it did not sand the track at the place of the accident. *Shumway v. City of Burlington*, 108 Iowa 424. But, to my mind, it substantially did this very thing. This instruction, as I read it, is as follows:

“If you find from the evidence that the defendant did have, or by the exercise of reasonable and ordinary care should have had, knowledge (of the slippery condition of the track) for such a length of time (before the accident, that it could in the exercise of reasonable care have taken steps reasonably necessary to prevent the accident), then the defendant was negligent; and if the injury to the plaintiff was caused as the direct and proximate result of defendant's negligence, and if plaintiff was himself not guilty of contributory negligence, then the plaintiff is entitled to recover in this action.”

As already stated, this instruction is complete in itself and leaves nothing open to intendment, or to be supplied by other instructions. Thereunder, defendant was expressly declared to be guilty of negligence if it had, or by the exercise of reasonable and ordinary care should have had, knowledge of the slippery condition of the track a sufficient length of time before the accident so that it could have taken steps to prevent the same. That this was erroneous should, I think, be conceded. Although defendant had, or should have had, this knowledge, it by no means follows as a matter of law that defendant was negligent. That question, as the majority say at the beginning of the opinion, was one of fact for a jury; because the statute quoted does not apply. It was manifestly for the jury to say, from all the circumstances disclosed, whether or not, with knowledge of the slippery condition of

the track, defendant was negligent in not sanding it, or in not equipping its car with a sand box. If the jury followed this instruction, as we must assume that it did, it must have found its verdict upon the thought that defendant knew or should have known of the slippery condition of the track; and although under other instructions this might not have been sufficient, still, as they are contradictory, the giving of the erroneous one calls for a reversal of the judgment. The negligence of the defendant under this instruction was clearly made out, if the jury found that defendant knew, or should have known, of the slippery condition of the track a sufficient length of time before the accident so that it could have prevented the same. The case must turn not on the negligence of the man in charge of the car which caused the accident, for he was a mere fellow servant of plaintiff, for whose acts defendant was not responsible. To hold defendant liable, it would have to be shown to the satisfaction of the jury that, under all the circumstances, defendant did not use ordinary and reasonable care in furnishing plaintiff a reasonably safe place to work, or with reasonably safe appliances with which to perform the work which he was then doing. Whether or not such care and prudence were exercised was a question of fact for the jury and not of law for the court. The employee in charge of the car knew that it was not equipped with a sand box, and knew that the track was slippery and had not been sanded, and the accident may have been due wholly to his want of ordinary care in handling the car; and, if this were true, defendant was not responsible unless it also was in fault in not furnishing a reasonably safe place to work, and this fault was the proximate cause of the accident.

The majority concede these rules, as I understand it, but still say that the only fault with the instruction is that it was inartificially drawn and should be construed with others which did announce the proper doctrine. In my opinion, this view runs counter to many of our previous cases. The rule heretofore has been that an erroneous instruction

covering the entire case cannot be cured by other instructions which announce the correct rule. *Quinn v. R. R. Co.*, 107 Iowa 710; *Haradon v. Sloan*, 157 Iowa 608, 611; *Lauer v. Banning*, 140 Iowa 319; *Thayer v. Coal Co.*, 121 Iowa 121; *Christy v. R. Co.*, 126 Iowa 432; *Blake v. R. R. Co.*, 149 N. W. 880*; *Meyer v. Boepple Button Co.*, 112 Iowa 51; *Martin v. Light Co.*, 131 Iowa 724, 734. The *Meyer Case*, *supra*, is very closely in point. That the instruction now being considered is erroneous sufficiently appears from the majority opinion, and that it cannot be defended upon any theory is to me very plain. And to my mind, it is equally clear that neither the facts disclosed by the record nor the other instructions given by the trial court cured the error.

The most that can be said of the other instructions is that they announced correct rules; but in so doing, they are in square conflict with the one which is now being considered. No matter how many times the court may have said in other instructions that the question of negligence was one for the jury, in 7½ it squarely said that, if the defendant had, or should have had, knowledge of the slippery condition of the track in time to have prevented the accident, it was guilty of negligence, and if this negligence caused the injury, and plaintiff was not guilty of contributory negligence, he was entitled to recover in this action.

What does it matter that in other instructions the jury was told that the question of defendant's negligence was for it to determine? How long would it consider that question in the face of instruction 7½? It was its duty, under this last instruction, to find defendant guilty of negligence, if it knew or should have known of the slippery condition of the track in time to have prevented the accident. Whatever may be said of the limitations upon the human language and of the understanding of the hearers and the readers thereof, we must not overlook its fair import when used in instructions to juries. To my mind, there is absolutely no room for con-

*Not yet officially reported.

struction. The instruction is as clear as words can make it; and even if others were correct, they were necessarily in conflict with the one I have quoted. Conflicting instructions have always been regarded as erroneous, and have so many times been disapproved that I need only cite the following late cases upon the proposition. *Benton v. Brown*, 145 Iowa 604; *Stewart v. R. R. Co.*, 136 Iowa 182; *Romans v. Thew*, 142 Iowa 89; *Blake v. Miller*, 135 Iowa 1; *Brusseau v. Brick Co.*, 133 Iowa 245.

For the errors pointed out, I would reverse.

SALINGER, J.—I concur in the dissent of DEEMER, C. J.

JOHN IRVINE, Appellee, v. THE CITY OF OELWEIN, Appellant.

NUISANCE: Damages—When Original—When Continuing—Right

- 1 to Elect. When a nuisance is permanent in its construction, and fixed, determinable and permanent damages at once result from the very nature of such construction, the damages are original, that is, all damages, present and prospective, accrue at once.

PRINCIPLE APPLIED: A city, without authority of law, erected a permanent concrete and iron dam across a creek in order to form a lake within its park. Plaintiff was an active promoter and instigator of the scheme. The water rose to its new level within two or three weeks, overflowing, as had been intended by all parties, certain lands. About a year thereafter, plaintiff bought by ordinary warranty deed 80 acres of land, known by him to be in part overflowed on account of said dam. He brought action for the permanent damage to the land, later amended to recover the depreciation in rentals, and asked for an abatement. At trial, he elected to recover the depreciation in rental value. His evidence showed both depreciation in rental value and injury by submergence of gravel beds, live springs, grass lands and timber, thus proceeding on the theory that, though the nuisance and resulting damages may have been permanent, yet he had the right to elect to treat the nuisance as a continuing one and sue, from time to time, for the loss of rental value instead of damages to the land. *Held:*

1. The nuisance and resulting damages being both permanent, the damages were *original*.

2. The damages being *original*, they belonged, not to plaintiff, but to the former owner from whom plaintiff bought, the warranty deed not carrying the same to plaintiff.

3. Plaintiff could not treat the nuisance as a continuing one.

4. Plaintiff was estopped to abate the nuisance.

VENDOR AND PURCHASER: Existing Permanent Nuisance—Damages—Action by Grantee. When damages occasioned to land by a nuisance are original, an ordinary warranty deed will not carry to the grantee in the deed the right to such damages.

NUISANCE: Who May Abate—Estoppel. Where plaintiff actively promoted and advised the erection by a city of a permanent dam across a creek in order to form a lake in the city park, intending and knowing that certain lands would be permanently submerged, and damages, original in their nature, were thereby caused to a landowner by the overflow, he (plaintiff) will not be permitted, after buying said land, to abate said nuisance or to treat the same as a continuing nuisance, except as to damages independent of those proximately following the construction of said dam.

Appeal from Fayette District Court.—HON. A. N. HOBSON, Judge.

FRIDAY, JANUARY 22, 1915.

REHEARING DENIED TUESDAY, JUNE 22, 1915.

ACTION at law to recover damages for an alleged nuisance, due to the construction of a dam which caused water to overflow lands belonging to plaintiff, and for an order for an abatement of the nuisance. The case was tried to a jury upon issues joined by defendant's answer, resulting in a verdict for plaintiff in the sum of \$200.00, and an order of abatement as prayed. Defendant appeals.—*Reversed and Remanded.*

W. B. Ingersoll, E. H. Estey, Jay Cook, and Rollin J. Cook, for appellant.

A. E. Irvine and Ainsworth & Hughes, for appellee.

DEEMER, C. J.—During the year 1907, the defendant city, at the instance or upon the request of many citizens of the town, for the purpose of creating an artificial lake in a park in the defendant city, undertook the erection of a reinforced concrete dam across a stream known as Otter Creek, which flowed through the city, or a part thereof. This dam was built near the south line of section 33 of the township in which the city is located, and upon ground belonging to the city. No condemnation proceedings were instituted, but the city obtained many voluntary conveyances from parties owning lands which would be affected by the dam, among whom was plaintiff. Plaintiff, being the then owner of the south thirty acres of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 33, made a deed to the defendant, which granted to the city, among other things:

“The right to maintain the dam as above set forth and overflow the lands above described belonging to us in such way and manner as shall be necessary in judgment of said City of Oelwein to create and establish and maintain said lake as above set forth forever. And it is further agreed that the said City of Oelwein shall have the right to the use of all lands overflowed for the purpose of boating, fishing, etc., and for all other purposes incident to the creation and maintenance of said lake for park purposes and the establishment and maintenance of said park upon the premises hereinbefore described purchased from the said G. A. Oelwein, the said party above named as grantors hereby and herein expressly waive any claim for damage from the said City of Oelwein resulting from the use and occupancy of said land in the way and manner above set forth. . . . It is expressly understood and agreed that the grant and right herein conveyed shall continue and endure so long as the said premises or any part thereof purchased from the said G. A. Oelwein shall be used for park purposes; and the said Isabella Irvine, Katherine Miles hereby and herein relinquish all their right of dower in and to the above described premises.”

Contracts were made for the construction of the dam, and the city proposed to issue its warrants for \$2,500 in payment thereof. The contractors were not satisfied with these warrants alone, and to protect them against loss, forty-five citizens, among whom was plaintiff, executed to said contractors a written guaranty of the payment of said warrants. The conveyance was made on July 30, 1906, and the guaranty on April 19, 1907. The dam was built by the contractors and completed on or about November 2, 1907, and water arose to the height of the dam and backed upon the lands within two or three weeks after its completion. The dam was built of concrete, steel and iron, and in as substantial and permanent a manner as possible; but when originally constructed, it was supplied with a wooden gate, which was afterward supplanted by an iron one, weighing about 1,000 lbs., and operated by cogs and a pinion wheel. This gate goes to the bottom of the dam, and is about 4 feet by 6 feet in size, and 3 inches thick. By raising it, all the water confined by the dam may be let out. This gate is not used to relieve flood water or ice, and all such flows over the top of the dam. Very little water passes through the dam itself, and it is as permanent as it is possible to make such a structure, the witnesses saying that it could only be destroyed by dynamite.

At the time of the construction of the dam and down until October 27, 1908, one Alice Guthrie was the owner of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 28, in the same township as the one in which the dam was built, known in the record as the "Holroyd Eighty," which was more or less affected by the back water of the dam, which fact was well known to plaintiff. On the last named date, she, in consideration of the sum of \$3,000, conveyed the same by warranty deed to plaintiff herein, covenanting that said land was free and clear of all incumbrance, and fully warranting the title. The price per acre was \$37.50. The deed was delivered and plaintiff thereunder became entitled to the possession and use of the land. Without any notice to the city to remove or abate

the dam, plaintiff, on January 6, 1911, commenced this action to recover damages and to abate the nuisance caused by the dam. This was followed by various other pleadings, to some of which we shall refer during the course of the opinion.

Doubts having arisen regarding the legality of the proceedings of the city in the premises, the legislature, by an act passed April 12, 1909, undertook to legalize the same as fully as if they had in all respects been in strict conformity to law. In the original petition filed in the case, plaintiff alleged that the dam of which he complains was and is a permanent concrete structure, and that it caused the water to back up and overflow not only the 80-acre Holroyd tract, but also the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the same section, which plaintiff had owned for many years. The exact allegations as to damages are as follows:

“That the effect of the erection of said dam across Otter Creek, at the place above mentioned, was to cause the water to raise in said creek, and flow back onto the plaintiff’s land, thereby submerging a large quantity of land in ordinary stages of water; and in flood seasons, to cover a large tract on both sides of said creek of the plaintiff’s land.

“That previous to the erection of said dam, the plaintiff was enabled to cross said creek from one side to the other on his land at most any point along said creek by easy fording. That since the erection of said dam, he is unable to cross from one side to the other except by boat.

“That the plaintiff has been damaged on account of the wrongful act of the defendant, in overflowing his land, in the sum of twenty-five hundred dollars.”

On September 17, 1912, plaintiff filed a supplemental petition, in which he charged:

“That the flooding and overflowing of plaintiff’s land alleged in the original petition herein has been continued by the defendant through the years 1911 and 1912.

"That the water standing upon the plaintiff's land has become stagnant and has accumulated scum and filth and has destroyed the timber and grasses growing on said land.

"That the defendant threatens to continue the overflowing of plaintiff's land and unless enjoined from so doing, the damages occasioned thereby will accrue from year to year and the value of plaintiff's land will be permanently destroyed.

"Whereas, plaintiff asks that he have judgment for the sum of Three Hundred Dollars (\$300), in addition to the amount originally asked in the petition herein on account of the damages caused by the flooding of the lands since the filing of the original petition, and that the defendant be enjoined and restrained from continuing or maintaining the dam and from overflowing and flooding plaintiff's land, and for interest and costs as prayed in the original petition herein."

After trial, and after submission of the case to the court on various motions, plaintiff was permitted to file another pleading, called an amendment to the supplemental petition, in which he alleged:

". . . and plaintiff has been damaged by reason of such wrongful acts of the defendant in flooding and overflowing his said land during the said years, 1911 and 1912, in the sum of Three Hundred and no-100 (\$300.00) Dollars."

Among other things, defendant pleaded plaintiff's guaranty of payment of the warrants as a complete defense to the action; that plaintiff was not the owner of the land until long after the dam was constructed and the water backed up, and that he is not an assignee of any claim for damages on account thereof; and also the conveyance by plaintiff to defendant of his lands for the purpose of waiving damages to his lands from the overflow of the water. It admitted the construction of the dam and that it was a permanent structure, and pleaded the legalizing act already referred to; and

further pleaded that plaintiff orally requested the defendant to erect the dam before any steps in that direction had been taken. Some other matters were pleaded in defense, which need not be mentioned.

Plaintiff demurred to some of these defenses, and the demurrer was sustained in part and overruled in part. No attention need be paid to these rulings, as they are not now challenged, and so are not involved in what we shall say regarding the merits of the case. Just before the taking of the testimony began, the following record was made:

“Comes now the defendant and moves the court to require the plaintiff to elect whether he will proceed in the trial of this case upon his claim for permanent damages for the construction of said dam as set forth in his original petition, filed herein, or whether he would proceed upon his claim for injunction and damages up to the time of this trial as set forth in his supplemental petition herein.

“And the plaintiff thereupon made the following election. The plaintiff elects to consider the damages as continuing damages, and to stand upon the entire pleading as a pleading of continuing damages.

“The defendant thereupon renewed its motion as follows:

“ ‘Comes now the defendant and moves the court to require the plaintiff to elect whether he will proceed in the trial of this case upon his claim for permanent damages for the construction of said dam as set forth in his original petition filed herein, or whether he will proceed upon his claim for injunction and damages up to the time of this trial as set forth in his supplemental petition herein. The court thereupon made the following statement, the attorney for the plaintiff having elected to proceed for such damages as he sustained to the present time, and having stated that he does not seek to recover all the damages he may sustain by flooding of the property which he may at any time hereafter sustain. Plaintiff excepts. Defendant excepts.’ ”

Plaintiff then proceeded with the taking of his testimony and introduced evidence to show that certain gravel pits or beds on the land were covered with water so that he could not get at them; that pasture land was damaged by ice and debris lodging on the land in the spring; that the water was covered with scum that came from the city, and the water became unpalatable; and that certain live springs were covered by the back water so that they could not be used by man or beast; that the grass and pasture lands were destroyed. He also claimed that certain timber was destroyed; but as a rule, he confined his proof of damages to the difference in the rental value of his land during each of the seasons of 1909, 1910, 1911 and 1912. Aside from this, the case was treated as for a permanent nuisance; and injury to the land, the grass and the trees was shown. Motions for directed verdict were filed both at the close of plaintiff's testimony and after both parties had rested, but these were overruled and exceptions taken.

The verdict was for plaintiff in the sum of \$200.00, and defendant moved in arrest of judgment, for judgment notwithstanding the verdict, and for a new trial. Each and all of these motions were overruled and judgment was entered upon the verdict and an order of abatement was also entered, restraining defendant from continuing or maintaining the dam.

Appellant raises many questions in the brief filed for it, and the fundamental propositions are not easy of solution. The trial court instructed in part as follows:

"This action was brought originally for permanent damages, and in reaching a proper conclusion in the case, it may be necessary for you to determine from the evidence whether the injuries complained of are permanent or continuing injuries. Whenever the acts complained of are of such a character that their continuance is necessarily an injury, and where they are of a permanent character, that will continue without change from any cause but human labor, there the

damage is an original damage; but where the injury from the alleged wrongful acts is temporary in its nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing.

"If you find from the evidence that the dam in question is a permanent dam, then under the undisputed facts in the case plaintiff cannot recover for any damages which may have been sustained to the premises previous to the time he became the owner thereof.

"If you find from a preponderance of the evidence before you that the dam erected by the defendant city overflowed plaintiff's land, that the city maintained said dam after plaintiff became the owner of the premises, and that said city continued to overflow plaintiff's land, then your verdict should be for plaintiff; and if you do not so find, then your verdict should be for defendant.

"If your verdict is for plaintiff, then you will allow him the difference between the rental value of the premises, if the said land was in the condition it was before it was overflowed by defendant, and its rental value in the condition it was immediately after such overflowing, all as shown by the evidence, and covering the years 1909, 1910, 1911 and 1912.

"You are instructed that you will allow no other items or amounts except rent in computing damages in case your verdict is for plaintiff, and you will not allow plaintiff to recover any amount whatever on account of the polluting of the river from above by the gas plant, railroad shops or by the defendant city."

Whilst many questions are argued, the chief contention is over the plaintiff's right to recover any damages at all because of the permanence of the structure, and the fact that plaintiff did not become the owner of the land until after the damage was done. The trial court instructed upon the question of the permanent character of the dam, and the jury found, in answer to a special interrogatory, that the dam did

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damages:
when original:
when continuing:
right to
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not constitute a permanent injury to the plaintiff's land; yet as a matter of fact there was no real issue in the pleadings over that fact, and the testimony, aside from a little with reference to periodic overflow and the special damage incident thereto, was directed to the damage done the land, the grass, the gravel and the timber on the land; and plaintiff evidently proceeded upon the theory that, while the nuisance was permanent, and the damages were to the land itself and not to the crops thereon, yet that he (plaintiff) had the right to elect to treat the nuisance as a continuing one and to sue for loss of the rental value instead of for damages done to the land itself. There are some cases which indicate that this may be done, where the party injured has at all times owned the land, as illustrated in *Risher v. Coal Co.*, 147 Iowa 459; *Hollenbeck v. Marion*, 116 Iowa 69; *Harvey v. R. R. Co.*, 129 Iowa 465. But the general rule is that, where the nuisance is permanent, and the damages are to the land itself, and all parties intend that the nuisance shall be permanent, the cause of action arises when the land is first flooded, and the recovery must be for the full amount of damages done the property, measured by the difference between the value of the land before and immediately after the dam was constructed and the flooding done. In such cases, the statute of limitations begins to run on the date of the first flooding and successive actions cannot be brought. *Powers v. City of Council Bluffs*, 45 Iowa 652, 658; *Peden v. R. R. Co.*, 73 Iowa 328; *Stodghill v. R. R.*, 53 Iowa 341. In such cases, the dam-

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ages are done to the then owner of the land, and his cause of action is not transferred to a grantee by warranty deed. Such is the express holding in *Peden v. R. R. Co.*, *supra*, a case which has never been challenged or repudiated since its announcement. We do not know just why the trial court submitted the question of the permanency of the dam to the jury. The issue was not tendered, and if it were, according to the court's instruction, it had no bearing

upon the issues joined; for under no theory would plaintiff be entitled to any damages done the land or for anything depreciating its rental value, before he owned it. Unless the instructions as a whole are to be treated as warranting the jury in finding damages for plaintiff because of the overflow of the lands, and not for a periodic and contingent flooding, then they are inconsistent, and for that reason, erroneous.

Moreover, there was no proper testimony as to damages due to periodic, non-continuous overflows; the evidence on this point was directed to the difference in the yearly rental value due to the permanent, continuous overflow of the land. Should it be assumed, then, that instruction number seven had reference to damages done the premises as a whole, and the other instructions to difference in yearly rental values due to the overflow of the lands, then they were inconsistent and likely to mislead the jury. Of course, there may be damages non-continuous in character, even in the event of a permanent nuisance; but if the overflow is persistent and continuous, and will certainly follow unless the nuisance be abated by the hand of man, then they are to be recovered in a single action, and all, past, present and prospective, are to be awarded. The distinction is very important in actions such as this, where the damages are done to land owned by a given person, who subsequently transfers the same to another, without conveying his right of action against the wrongdoer to his grantee. Alice Guthrie was the owner of this land for some months after the water had risen to its full height, by reason of the construction of the dam; and at the time of her conveyance to plaintiff, she had a cause of action against the defendant for the injury done to her land. This she did not transfer to the plaintiff; for it was not assigned by her deed. *Peden v. R. R.*, 73 Iowa 328. And she either consented to the overflow of her land, in which event plaintiff could not recover damages, or she still has a cause of action against the defendant which she has never assigned or transferred to the plaintiff. If she has such an action, then plaintiff should not

recover; for her right, by reason of the permanency of the structure, was to recover all damages, past, present and future. This is pointed out in the cases already cited, and especially the *Peden* and *Harvey* cases, *supra*. See also *Bizer v. Ottumwa Co.*, 70 Iowa 145; *Town of Troy v. R. R. Co.*, 3 Fost. (N. H.) 83.

Defendant should not be subjected to a double liability by reason of a transfer of the land. It is true, of course, that defendant has not, so far as this record is concerned, acquired either a legal or prescriptive right to maintain the dam so as to flood the land in question, and it is also true that plaintiff has a warranty deed to the property and may, perhaps, recover from his warrantor in the event he fails in his action to abate the nuisance; but this does not give him a right of action for damages which was vested in his grantor, and never transferred to him by assignment or otherwise.

There are but two instances where the nature of the nuisance is regarded as important: one where the action is brought more than five years after the cause thereof accrues; and the other where the property has been transferred after the damage is done. In the former, if the structure is permanent and the damages continuous, the statute begins to run from the time the flooding commences; and in the latter, the cause of action is in the party who owns the property at the time of the flooding.

The trial court had considerable difficulty with the case, and we too find it full of trouble, because of the conflicting character of the cases from other states, and an apparent want of harmony in our own decisions. This is due largely to the fact that there are all kinds of nuisances and that the distinction between trespass and nuisance has not always been preserved. As a general rule, if a nuisance is permanent in character, is intended to remain in the condition in which it was erected until destroyed by the elements, and the damages are to the land itself, especially where the erection is for a public or semi-public purpose, the damage is treated as

original, to be recovered in one action, and not continuous in character. See cases hitherto cited, and *Troy v. Cheshire R. R.*, 23 N. H. 83, 101; *Parks v. Boston*, 15 Pick. 198; *Hargreaves v. Kimberly*, 26 W. Va. 789; *Finley v. Hershey*, 41 Iowa 389; *Van Orsdol v. R. R.*, 56 Iowa 470. As heretofore pointed out, it is sometimes optional with the party injured to treat the nuisance as permanent or continuous, at his election; but much depends upon the character of the nuisance. If the erection or structure be permanent, but injurious because of the use made of it, or if the nuisance be a mere trespass, and the trespasser did not have and could not acquire any rights in the premises save by grant or prescriptive use, it is, as a rule, always permissible for the party injured to elect what remedy he will pursue. If he cares to have the nuisance remain or to recognize the trespass, he may have as his damages that which will make him whole because of the depreciation in the value of his property; but in such cases, he is not entitled to have the nuisance abated. On the other hand, if he wishes to get rid of the nuisance or the trespasser, he may have his action for the damages actually suffered down to the time of the commencement of his suit, and an order for the abatement of the nuisance. These damages are, as a rule, the decrease in the rental value down to the time of suit, with such other special damages as he may have suffered which are not prospective in character, and in this way he is made whole.

The controlling features in the instant case are that the dam was and is permanent in character—as permanent as anything which can now be made by the hand of man. The parties each and all understood that the water was to be permanently dammed so as to flow back on the land owned and purchased by plaintiff; and in so far as anything may be said to be permanent in character, this nuisance was of that kind. Moreover, although the defendant city had no power, when it erected the dam, to condemn land for the purpose of making an artificial lake, what it did and undertook to do

was for the public benefit and convenience, and so far as it could legally do so, the legislature authorized the same.

The injury was done to the original owner of the land, and the damage to her was original, and while, perhaps, she might have elected to treat it as a continuing nuisance, a point which we do not now decide, yet when she conveyed the land to the plaintiff, she did not pass to him the right to sue for all damages past, present and prospective, due to the erection of the dam. This has been held in several cases already decided by this court, to some of which reference has already been made.

It may be that plaintiff has a right of action against his grantor upon the covenants of warranty in the deed to him, or it may be that it will be presumed in the first instance that the compensation he paid for the land was based upon the permanency of the dam and a deduction made on account thereof, as held in *Galt v. R. R.*, 41 N. E. (Ill.) 643; *C. & E. I. R. R. v. Loeb*, 8 N. E. 460.

Although there was no proof as to the actual value of the land without the nuisance created by the dam, it is not too much, we think, to assume that \$37.50 per acre for land lying so close as this does to the city of Oelwein is an indication that plaintiff received a large reduction in the purchase price, either on the theory that he was buying a law suit with it, or that he was taking it subject to defendant's right to overflow it. If wrong in this and plaintiff's theory be correct as to defendant's rights, he may doubtless sue upon the covenants of warranty in his deed; and, unless her action is barred, his grantor may have her action against the city for damages.

Recurring again to the use made of the land by the defendant city, it may be conceded that it had no right to condemn, at the time it erected the dam, and that the legal-

izing act of the legislature has no effect upon the case; yet it still appears that as to the plaintiff in this case, he is in no position to complain. The act as to him was not unlawful. He personally

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estoppel.

consented to it, was one of the promoters thereof, and assisted in the financing thereof. True, he did not then own part of the land which he now claims was damaged; but as bearing upon his right to elect, if he ever had any, and of his right either in law or equity to have the alleged nuisance abated, his conduct is important; and, as we think, effectually deprives him of the right to treat this nuisance as a continuous one, and to have it abated in an action at law.

It must be borne in mind that we are not speaking now of periodic or noncontinuous overflows of plaintiff's land, or of any nuisances independent of those proximately following the construction of the dam. Such damages would not, of course, be original, but continuing, and for such separate damages, or for any occasioned by anything other than the overflow of the land, anything due to noxious odors, etc., plaintiff may have a right of action; for as to these his grantor could not have sued; or if she had done so, she could not have recovered more than the periodic losses, or for the temporary harm done her or her premises. But in so far as permanent original damages are concerned, the remedy was in her and not in this plaintiff. This is the doctrine announced in *Harvey v. R. R. Co.*, *supra*.

This action is not bottomed on negligence or upon trespass, but is purely for a nuisance created by the defendant, and it is practically conceded in the pleadings that the nuisance was permanent in character; but the trial court, although submitting the issue of permanency, failed to apply the rule of permanency to the case in so far as it affected the measure of plaintiff's recovery, doubtless upon the theory that, even if permanent, plaintiff had the right to treat it as continuous and to have his damages measured by the difference in rental value. In these respects, as applied to the particular facts of the case, there was error. There was really no issue as to the permanency of the structure, and the only reason for submitting it at all was to determine whether or not plaintiff could recover anything due to the flooding of his lands.

The general rule, as we have seen, is that if the nuisance was permanent, the damages were original and inured to the owner of the land at the time the land was first flooded, and did not pass under an ordinary warranty deed to his (or her) grantee. The jury, without any warrant in the testimony, found that the structure was not a permanent one, and the trial court was in error in submitting that issue; especially in not further instructing, had the issue been properly tendered, that, if permanent, plaintiff could not recover. The cases, although in conflict, are overwhelmingly in support of the rules here announced, and we shall not do more than cite a few which sustain our conclusions. They are as follows: *Bizer v. Power Co.*, 70 Iowa 145; *Comm'rs v. Bradford*, 51 Atl. (Md.) 614; *Risher v. Coal Co.*, 147 Iowa 459; *Vogt v. Grinnell*, 123 Iowa 332; *Hempstead v. City*, 63 Iowa 36; *Fowler v. R. R.*, 91 Iowa 533; *Hodge v. Shaw*, 85 Iowa 137; *Finley v. Hershey*, 41 Iowa 389; *Van Orsdol v. R. R.*, 56 Iowa 470; *Hughes v. R. R.*, 141 Iowa 273; *Stodghill v. R. R.*, 53 Iowa 341; *Tegeler v. Kansas City*, 68 S. W. 953; *C. & E. I. R. R. v. Loeb*, 8 N. E. 461; *Galt v. R. R.*, 41 N. E. 643; *City v. Wright*, 41 N. E. 217; *Farley v. Gate City Co.*, 31 S. E. 193; *King v. City of Danville*, 107 S. W. 1189; *Fowle v. New Haven Co.*, 107 Mass. 353; *Same case*, 112 Mass. 334; *Jacksonville R. R. v. Lockwood*, 15 So. 327; *Highland Ave. v. Matthews*, 10 So. 267; *Gartner v. R. R.*, 98 N. W. (Nebr.) 1052; *Cobb v. R. R.*, 58 S. E. 862; *M. K. & T. R. R. v. Graham*, 33 S. W. 577. *Contra: Uline v. R. R.*, 4 N. E. 536; *Aldworth v. City*, 26 N. E. 229; *Mayor v. Dowling*, 47 S. W. 700.

We recognize that no general rules should be announced applicable to all cases of nuisance or of trespass upon real estate; for there are many kinds of nuisances, and many things which are sometimes called nuisances that are mere trespasses. No general rule should be announced applicable to all of these. It is enough to decide the case before us upon its own peculiar facts.

On no theory can the instructions be sustained, and the order of abatement was without authority of law.

For the errors pointed out, the judgment must be, and it is, reversed and the cause remanded.—*Reversed and Remanded.*

All the Justices concur.

B. H. JACKSON, Executor, Appellant, v. CLARA G. NORTHRUP
et al., Appellees.

TRUSTS: Constructive—Evidence—Insufficiency. Evidence re-
1 viewed and held insufficient to establish a resulting trust.

GIFTS: Mental Competency—Evidence—Sufficiency. Evidence re-
2 viewed and held sufficient to establish mental competency to
make a gift, and the actual making of a gift, by an old man in
urgent need of care, in favor of a relative furnishing such care.

PLEADINGS: Conversion—Evidence of Gift as Defense—Special
3 **Pleading.** A litigant need not allege the negative of a propo-
sition in order to introduce evidence bearing thereon, when the
affirmative of the proposition has been alleged and must be estab-
lished by the adverse litigant.

PRINCIPLE APPLIED: Plaintiff, as executor, in substance
alleged that the defendant had fraudulently converted to his
own use certain funds belonging to the deceased in his lifetime.
Answer, general denial. *Held*, evidence that the funds had been
delivered to defendant by deceased as a gift was admissible
without specially pleading the "gift."

Appeal from Polk District Court.—HON. W. H. MCHENRY,
Judge.

TUESDAY, JUNE 22, 1915.

PLAINTIFF is the executor of the estate of Charles E. King, deceased. He has brought this action against the defendants for alleged conversion of funds belonging to the King estate. His petition alleges that such converted funds were invested by the defendants in the purchase of certain real property and he prays that a constructive trust be im-

pressed upon such property in favor of the plaintiff as executor and that the defendants be adjudged to hold the legal title thereto in trust for such executor. The answer of the defendants is a general denial. There was a decree dismissing the petition and the plaintiff appeals.—*Affirmed.*

Strock & Wallace, for appellant.

Bowen & Alberson, for appellees.

EVANS, J.—I. Charles E. King had been a long time resident of Des Moines. His death occurred on October 26, 1912. He was seventy-five years of age. Up to a year or more prior

1. TRUSTS: constructive: evidence: insufficiency. to his death, he had been the possessor of property in the form of moneys and credits to the extent of \$10,000 or somewhat more.

He had no children. His wife had died in 1908. After the death of his wife, he occupied his home alone until January, 1910. In November, 1909, he executed his will, whereby he made provision for all of the children of his four deceased sisters. By such provision, he directed the division of his estate into four parts and that each fourth part should go respectively to the representatives of each deceased sister *per stirpes*. The defendant, Mrs. Northrup, is a daughter of one of such deceased sisters, Mrs. Seth Graham. The other defendant is her husband. In January, 1910, King became sick and needed care. He vacated his home and moved to the home of his brother-in-law, Seth Graham. Mr. Graham was himself more or less of an invalid, and his daughter, Mrs. Northrup, with her husband, lived with him and did his house-keeping. Into this home, King came for a brief time before going to the hospital. Shortly thereafter, he went to the hospital to receive surgical treatment and remained there about two weeks, after which time he returned to the Graham home. In this home, he continued to reside until he and Mr. and Mrs. Northrup moved to another home acquired by the North-

rups with his assistance. In this new home, these three lived together until the death of Mr. King.

The foregoing is perhaps a sufficient indication of the background against which the material evidence in the case must be viewed.

Among the assets of King were two bank certificates of deposit of \$4,000 each, which he had held by successive renewals for several years. The new home of the Northrups was purchased about June, 1911. The property consisted of a residence and its appurtenances and thirty acres of ground in the near vicinity of Des Moines. The purchase price was \$8,500. At this time, one of the bank certificates for \$4,000 was indorsed by King to Mr. Northrup and by him applied upon the purchase price of the new home; \$500 of the purchase price was contributed as a gift to Mrs. Northrup by her father, Seth Graham. A mortgage for \$4,000 was executed upon the home for the purpose of obtaining the remainder of the purchase price.

In October, 1911, the other bank certificate for \$4,000 was also indorsed to the defendant Northrup and at the same time cashed at the bank. It is because of these transactions that the plaintiff asks that a constructive trust be impressed upon the land in his favor.

It is the contention of the plaintiff that King, at the time of these transactions, was mentally incompetent to transact business and especially incompetent to make a gift. The contention for the defendants is that King was not mentally incompetent and that he did in fact transfer such certificate to them as a gift. The trial court found with the defendants.

There is a point of view from which this alleged gift comprising the substantial part of the donor's estate might seem quite unreasonable and therefore incredible. But as already stated, the evidence must be read against its background.

On the question of mental incompetency, the very clear preponderance of the evidence is with the defendants. The

substance of the evidence tending to show mental incompetency is failure of recognition of the witness by Mr. King and a failure to engage in conversation or to notice the presence of acquaintances on certain occasions and an alleged "dazed" appearance. This testimony was given almost wholly by parties in interest. It is undisputed that for many years Mr. King had been very deaf. This condition is sufficiently described by Mr. Powell, his former attorney, who was a witness for the plaintiff.

"Mr. King was very deaf, he could not hear an ordinary conversation, and in order to make him hear, I always used to go around my desk where he was sitting, and put my lips very close to his ear."

Mrs. Gregory, one of the beneficiaries of the will, described his condition as far back as 1908, as follows:

"When he came to our house he would stay two or three hours. Uncle was very quiet, but was always of a cheerful disposition. He had always been hard of hearing. Sometimes I could not make him understand what I had to say, but he would always start some conversation and talk a good while on his subjects intelligently."

It is undisputed also that for some years Mr. King had been subject to occasional involuntary evacuations of the bowels and bladder. The frequency of these untoward occasions increased as he grew older. In the light of these undisputed facts, the descriptive evidence of plaintiff's witnesses is not very persuasive. On the other hand, a very considerable array of apparently disinterested and intelligent witnesses have presented the appearance and conduct of Mr. King up to a comparatively short time before his death. Much of this testimony is specific in time and circumstance. No other conclusion is fairly possible from the testimony as a

whole than that the mental competency of the deceased has not been successfully assailed. Whether the transfer of the certificates was intended as a gift or not is a more difficult question. The claim of gift is supported by the direct evidence of Mrs. Northrup alone. As a witness, she related in detail the conversation between King and her husband (who was also deaf). Because of her interest, her testimony should be subjected to great scrutiny. From the very nature of the case, no direct testimony can be produced to contradict the same. Surely it ought not to be accepted lightly, and perhaps it ought not to be accepted in itself as sufficient unless it has satisfactory corroboration in the various circumstances of the case. After a very careful consideration of the entire record, we all reach the conclusion that all the circumstances of the case, most of them undisputed, strongly corroborate the claim of gift.

From King's point of view in 1911, he needed a home with someone who could give him patient and kindly care. He had an expectancy of life of a few years and it is an exceptional man who does not expect to outlive the expectancy of the mortality tables. The care which he needed was unpurchasable. The cleansing of garments and bedclothes was one continuing task. There were many nephews and nieces who had been remembered in the will. They were all affectionate and kindly to their uncle, but only one came under the load. She had been selected by King himself in January, 1910, as the one upon whom he would venture to lean. For a year and a half before the purchase of the new home, she had borne his infirmity without complaint and without price. She and her husband were themselves poor and in a sense homeless. It clearly appears that King was interested in their acquisition of a new home. He was close and careful with his small business affairs. He was not lacking in intelligence. We must assume that there was some intelligent reason for his transfer of the bank certificates at the time shown. He had selected their home as his. He had

been with them long enough to know whether he could trust their patience with his infirmity, and their fidelity to his needs. Unless he was determined at all hazards to keep his little estate intact for final distribution among his nieces and nephews, the use of these bank certificates in the acquisition of this home would be quite in accord with his own interests. It would naturally tend to his own comfort and enjoyment, assuming, of course, that he expected to occupy the home with the Northrups to the end of his days.

If he were separated entirely from affectionate relatives and were required to purchase his care from hospital and nurse, his little estate must have suffered great depletion. In addition to the circumstances here referred to, there was the direct evidence of one disinterested witness, who had been a long-time acquaintance of Mr. King, to the effect that he had told the witness that he had disposed of his property in the manner herein claimed.

In view of our concurrence with the view of the trial court on the question of fact here involved, we deem it needless to go into a more detailed discussion of the evidence. We do not overlook one or two circumstances relating to the alleged codicil and to a claim filed by Mr. Northrup. It is strongly urged that these circumstances discredit the claim of gift. The circumstances, such as they are, are entitled to consideration, but they are not so damaging to the defendants as the plaintiff contends. The first is lacking in proof. The second might properly have called for an explanation from Mr. Northrup. The explanation, however, would necessarily call for a personal transaction between him and the deceased, to which he would be incompetent to testify. Whether he ought to have offered to testify on the subject, or whether the plaintiff should have offered to waive objections to his testimony, we will not now consider. The circumstance was not of such a nature as to be controlling in any event.

II. It is strongly urged in argument by the appellant that the pleadings of the defendants opened no door to proof

of a gift. It is urged, therefore, that the evidence on that question should be wholly disregarded. The point is evidently raised for the first time in this court. It was not made in the lower court either by attack upon the pleadings or by objections to the evidence. It must be said that the pleadings on both sides were loosely drawn. The petition charged the defendants with converting the moneys of the *estate* of Charles King. There was no allegation or suggestion therein of the relation existing between the defendants and King in his lifetime. Under the evidence, King might have been found mentally competent and it might have been found that he voluntarily transferred the property to the Northrups, and the question might still remain whether the transfer was made by way of a gift or by way of a loan. But the petition was not framed to claim a recovery upon any other ground than that of fraudulent conversion. Evidence of a gift from King in his lifetime certainly tended to negative the claim of fraudulent conversion of the same funds. In view, therefore, of the form of the petition, the plaintiff is in no position to contend that the defendants should have pleaded the gift as an affirmative defense. The parties introduced their testimony in the court below upon that issue and the case was made to turn upon it. We have therefore undertaken to dispose of it here upon the same theory of the pleadings as was adopted below both by the trial court and by the parties. The order of the trial court must be—*Affirmed*.

DEEMER, C. J., WEAVER and PRESTON, JJ., concur.

MERCHANTS NATIONAL BANK, Appellee, v. G. W. GRIGSBY, Appellant.

SALES: Warranty—Breach—Failure of Buyer to Return—Waiver.

- 1 When the buyer of a stallion, warranted to be a sure breeder, was, under the conditions of warranty, required to accept an-

other animal and return the first animal by a certain date, the statement of the seller, in response to a request from the buyer for another animal because the warranty on first one was breached, that he, the seller, had at that time no other animal to send, but would have others in the fall, would justify a finding that the seller waived the return, if the jury should find that the buyer could not in reason be expected to lose the service of the stallion for the entire season.

SALES: Warranty—Waiver of Conditions—Subsequent Extension of

- 2 **Contract—Effect.** The effect of the waiver of the conditions of a warranty, in the absence of fraud, is entirely nullified by a subsequent extension to a future date of the entire terms of the contract.

SALES: Warranty of Animal Diseased When Purchased—Burden of

- 3 **Proof—Waiver.** A warranty that a stallion is a sure breeder "provided he keeps in as sound and healthy condition as he now (date of sale) is," and to be returned by the buyer in case the warranty is breached, does not give the buyer a right to return the animal for a disease not existing at the time of sale, but does give him the right to return for a disease existing when bought. *The buyer must shoulder the burden to so show.* If he is successful, then the flat refusal of the seller to receive back the horse is, of course, a waiver of the duty to return.

SALES: False Representations—Scienter—Sufficiency of Evidence.

- 4 In order to avoid a sale by reason of false representations, the material things to show are (a) the representations, (b) the falsity, and (c) the seller's knowledge of the falsity. In instant case, evidence reviewed and held sufficient to carry the question of *scienter* to the jury.

PRINCIPLE APPLIED: The seller was an experienced importer of horses from Belgium, where a progressive, incurable disease known as "summer sores" was prevalent, and usually found in imported horses. These sores could be dried up during winter. The buyer knew nothing about the disease. The seller was familiar with the disease and had had experience with it in lawsuits over the sale of horses. The horse in question was imported from Belgium two months before sale. A characteristic of the disease was the continued loss of flesh. This horse was thin when bought and never improved. Veterinarians testified that the horse had the disease when bought. Small scars were noticed on the horse when bought, which might have been the result of dried up sores. When the horse was bought, the seller withheld delivery, saying he wanted to show the horse at

a Chicago horse show and improve his flesh. His condition in flesh did not improve and he was not exhibited. The seller said he thought best not to increase his flesh, and delivered the horse to the buyer in December. *Held*, evidence sufficient to go to the jury on the question of *scienter*.

BILLS AND NOTES: Title of Payee Defective—Negotiation to

- 5 **Avoid Defenses—Effect on Indorsee—Burden of Proof.** The indorsee of a note may, in the first instance, rest on the presumption of law that he is a "holder in due course." But the moment it appears that the title of the original payee was defective within the meaning of the Negotiable Instrument Law, or that the original payee has negotiated the note in order to prevent a defense thereto, then the indorsee must rest no longer. He must at once take the laboring oar and show that he is, in fact, a "holder in due course." (Secs. 3060-a55, 3060-a59, Sup. Code, 1913.)

PRINCIPLE APPLIED: A note was negotiated as collateral security to an original loan twelve days before due, two installments of interest being then overdue. The indorser (payee) was a director of the plaintiff bank and agreed to bear the cost of litigation, but this was a long standing arrangement, as many such notes had been transferred and much litigation had resulted, with defenses the same as on note in question. The officers of the bank, other than the indorser, knew nothing about the maker and made no inquiry. Prior to the negotiation of the note, the maker and the payee of the note had had much controversy over a warranty of the horse for which the note was given, though plaintiff claimed defendant had never threatened defense but had asked for an extension of time. The maker (defendant) claimed, in defense to the note, both false representations and breach of warranty of the horse. *Held*, the indorsee (plaintiff) had the burden of proof to show it was a "holder in due course."

Appeal from Boone District Court.—HON. R. M. WRIGHT,
Judge.

SATURDAY, NOVEMBER 28, 1914.

REHEARING DENIED TUESDAY, JUNE 22, 1915.

ACTION at law upon a promissory note for \$1,000. The payee of the note was J. Crouch & Son, who endorsed the

same to the plaintiff before maturity. The defendant admits the execution of the note, but sets up in defense a breach of warranty and false representations, and failure of consideration, and that the plaintiff is not a good-faith holder in due course. At the close of the evidence, there was a directed verdict for the plaintiff. The defendant appeals.—*Reversed.*

Harpel & Cederquist, for appellant.

Read & Read, for appellee.

EVANS, J.—The note in question was given on September 28, 1909, and was one of a series of three notes of \$1,000 each, representing the purchase price of an imported stallion sold by the payee to the defendant upon such date. Delivery of the horse was made sometime in December, 1909. A written bill of sale was delivered to the purchaser, including a guaranty as follows:

“We have this day sold the imported Belgian stallion, Bon Espoir de Solre No. 4072 (31720) to G. W. Grigsby, of Madrid, Iowa, and we guarantee the said stallion to be a satisfactory sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory sure breeder with the above treatment, we agree to take the said stallion back, and the said G. W. Grigsby agrees to accept another imported Belgian stallion of equal value, in his place, the said stallion Bon Espoir de Solre No. 4072 (31720) to be returned to us at La Fayette, Indiana, in as sound and healthy condition as he now is by May 1, 1911.”

Taking the evidence offered on behalf of the defendants as true, which we must do for the purpose of this appeal, the above warranty was breached, and the horse proved to be worthless. The horse was not a sure foal getter. Only a

very small percentage of his service resulted in foals. On or about July 1, 1910, the defendant discovered that the horse was infected with a disease called in this record "summer sores." This was manifested by the breaking out of certain sores upon various parts of the body at this time. The disease is one which was wholly unknown to the defendant prior to that time. Veterinary surgeons were called to the treatment of the horse. This disease is a progressive, incurable disease, running a course of a few years. It is made outwardly manifest upon the afflicted horse by the breaking out of sores in the summer time. These, in the early stages, may be temporarily cured or dried up during cold weather. During the first summer of such attack, such sores are usually small and may pass unnoticed by a person unfamiliar with the disease. They increase in virulence with every succeeding summer. Such was the course of the disease alleged in this case. The horse died therefrom on August 24, 1912. From the time the defendant received the horse, he gradually lost weight and so continued until his condition was very emaciated. This was consistent with the course of the disease.

The defendant pleaded not only breach of warranty but false representations, based largely upon the same state of facts and upon the further fact that the seller knew that the horse in question was not sound and healthy and was not a good breeder, and yet represented him to be such. The pleas of breach of warranty and false representations are somewhat mixed. Defendant's answer, as to the plea of false representation, is quite indefinite. In the absence of attack, we treat it as sufficient. The question submitted for our conclusion is that of the sufficiency of the evidence in support of the affirmative defenses. Was there sufficient evidence to go to the jury on the questions: (1) Of breach of warranty. (2) If there was breach of warranty, was the condition of the warranty waived by the seller? (3) Was the horse infected with the disease in its incipient stage at the time of the pur-

chase? (4) Did the plaintiff acquire the note in good faith and in due course?

1. The evidence of breach of warranty as

1. SALES : warranty : breach : to the failure of the horse as a sure foal getter
 failure of is abundant, and we need not recite it. Appellee does not contend otherwise.
 buyer to return : waiver.

The condition of the warranty, however, was never actually performed by the defendant, in this, that he never returned the horse to La Fayette, Indiana. His contention is that such return was waived by the conduct of the seller. In June, 1910, he wrote the following letter to the sellers:

“Madrid, Iowa, June 15, 1910.

“Mr. Crouch & Son, La Fayette, Ind. Dear Sir: Since writing you I have had six mares to return. I don't think this horse has settled anything bred to him. Have you got a Belgian horse that you could let me have to finish the season with. I would have to have a good one to fill his place. If I don't get another horse I don't know what I will do. Let me know by wire what you will do. Be sure and let me know what you will do as soon as you receive this.

“Yours respectfully, G. W. Grigsby.”

The sellers replied to this letter stating that they were entirely sold out of Belgian horses, but would have some more in the ensuing fall.

In view of this correspondence, it would have been an idle proceeding for the defendant to go through the form of returning his horse to La Fayette and demanding in exchange another Belgian stallion of equal value at that time. His letter was a fair request for an adjustment under the conditions of the guaranty. Crouch & Son had put it out of their power to perform their guaranty, for the time being. They were doubtless entitled to reasonable time and opportunity, but the defendant was certainly entitled to go to the jury on the question whether he could reasonably be required to lose the entire season and wait until fall for the exchange. If

not, then the sellers must be held to have waived the condition contained in the guaranty, and they thereby rendered their guaranty absolute.

On March 17, 1911, however, the written guaranty was by another writing extended to May 1, 1912.

2. SALES : war-
ranty : waiver
of conditions :
subsequent ex-
tension of
contract :
effect.

We think the effect of this writing was to extend the condition, likewise. The previous waiver of the condition, therefore, is no longer available to defendant, unless the extension

was entered into through the fraud of Crouch & Son, as contended by defendant.

It was arranged between the parties at that time that the defendant should give the horse further trial and treatment. In December, 1911, the defendant again visited Crouch & Son and sought an adjustment. They told him at

3. SALES : war-
ranty of
animal dis-
eased when
purchased :
burden of
proof : waiver.

that time that under no consideration would they receive back the horse in his then condition, because of the sores upon his body.

This refusal was based upon the contention that under the conditions of the warranty, the horse was to be returned in as "sound and healthy" condition as when received. This is a pivotal point in the defense. The defendant could not require Crouch & Son, under the conditions of the warranty, to take back the horse in his diseased condition unless such disease was already upon him in its incipient stage at the time the defendant purchased him. The burden was upon the defendant not only to prove breach of warranty, but to prove also a waiver of the condition as to returning the horse. If, in December, 1911, the defendant was legally entitled to return the horse in his then condition, and offered to do so, then the declaration of Crouch & Son was sufficient as a waiver of a formal return of the horse. The burden, therefore, was upon the defendant, to prove that the diseased condition of the horse, which formed the basis of the sellers' objection to his return, was already upon the horse in its incipient stage at the time of the sale to the defendant. This

being proved, the seller had no right to base objection to his return upon the ground of this disease.

The defendant introduced considerable testimony tending to prove that the horse must have been infected with the disease, and must have had it in its incipient stage before it was purchased by him. The disease is rather an infrequent one in this country. It is frequently found in Belgium and France and other European countries. When found here, it is usually in imported horses. Crouch & Son were extensive importers. They were more or less familiar with the disease and had had experience with it. They had purchased this horse in Belgium about two months before he was sold to the defendant. The horse was a fine individual, and would weigh, in ordinary flesh, between 2,100 and 2,200 pounds. He was somewhat thin, however, when he was sold to the defendant. The defendant was never able to improve his condition as to flesh. He gradually lost weight until such loss amounted to over 500 pounds.

The defendant examined veterinary surgeons as witnesses. Their testimony all tended to show that the horse must have been in the incipient stages of this disease in 1909. One of these surgeons treated the horse in 1910. He testified to the apparent condition at that time. He also testified to his opinion that the sores upon the horse in 1910 were second or third year sores. They were too large for first year sores. None of this testimony was directly disputed. It is not incredible that an experienced veterinary surgeon could form reliable judgment as to the approximate time a progressive disease had run at the time of his observation of it.

There is evidence also by the defendant of various symptoms and scars observed by him immediately after the purchase, the significance of which, however, was not appreciated by him at the time. One of these was the condition of the horse's flesh, to which we have already referred. Others were small scars upon the skin which could have been the result of earlier sores.

We think the evidence was sufficient to go to the jury on the question whether the horse was diseased at the time of the sale. If yea, then, as already indicated, the advanced stages of the disease would not justify the sellers' refusal to take back the horse in accordance with the conditions of the guaranty, and such refusal amounted to a waiver of conditions.

2. Was there sufficient evidence to go to the jury on the question of false representations? Plaintiff testified to oral representations to the effect that the horse was sound and

4. SALES : false
representa-
tions :
sufficient : suffi-
ciency of evi-
dence.

healthy and a sure foal getter. The evidence, therefore, is abundant to show the fact of representations, and that the representations were not true. Whether Crouch & Son knew

the falsity of the representations is not shown by direct evidence. Reliance is had here upon various circumstances. Crouch & Son were experienced importers of horses, and were more or less familiar with the disease under consideration here. They had had previous litigation over the sale of a horse wherein the same disease was involved. In so speaking, we only assume the truth of the evidence on behalf of the defendant for the purpose of the discussion.

If it should be found from the testimony already referred to that the sores appearing in 1910 were second or third year sores, then the diseased condition of the horse must have been apparent to an experienced observer in the summer of 1909. Crouch & Son had possession of him for two months or more. The horse was not actually delivered to defendant at the time of sale. Crouch asked to retain the horse in order to exhibit him at the horse show in Chicago in December. For that purpose, he expected to improve his condition and increase his flesh. When December came, the condition of the horse had not improved and he was not exhibited. This was a disappointment to the defendant. The reason given by Crouch for the failure to prepare the horse and to exhibit him was that he thought it would be better for him not to increase his flesh.

In the shape which the case has taken under the record, the question of *scienter* is not of controlling importance. If the defendant is entitled to prevail on the ground of false representations, he is likewise entitled to prevail on the ground of breach of warranty, provided he shows that the horse was in fact diseased when he bought him. In view of the fact that the condition of the horse, if diseased, could and ordinarily would have been observed by Crouch & Son when they had him, and perhaps ought to have been observed before they put him upon the market, we think the evidence as a whole was sufficient to go to the jury also on the question of *scienter*.

3. Was the note sued on acquired by plaintiff in good faith and in due course, within the meaning of the Negotiable Instrument Act; and upon which party is the burden of proof upon such question? Concededly, if the

5. **BILLS AND NOTES:** title of payee defective: negotiation to avoid defenses: effect on indorsement: burden of proof.

note was obtained by false representations, the burden of proof was on the plaintiff. Again, if Crouch & Son negotiated the note for the purpose of preventing a defense thereto, such negotiation thereof was a fraud upon the defendant within the meaning of the Negotiable Instrument Act. Such fraud would cast the burden of proof upon the plaintiff. Sec. 3060-a55, Code Sup.; *Bank of Bushnell v. Buck Bros.*, 161 Iowa 362. Many circumstances are shown which tend to prove such fact. The note was negotiated on July 19, 1911, only twelve days before maturity. Two installments of annual interest were past due and unpaid. It was received by the plaintiff as collateral to a note for \$15,000 then executed by Crouch & Son. Such note was given for a loan of like amount. The proceeds of the loan were placed to the credit of Crouch & Son in the plaintiff bank. When it was checked out does not appear.

The note in suit was negotiated to plaintiff under a contract between it and Crouch & Son, whereby Crouch & Son agreed to bear all expense of litigation. Such contract, how-

ever, had been in force between such parties for several years, and many notes had been purchased thereunder, and considerable litigation had been conducted by the plaintiff bank thereunder on other notes. In such litigation, it encountered defenses similar to those in the case at bar. It was familiar with the business of Crouch & Son and knew that their notes represented purchase price of horses sold, and that more or less litigation resulted to them.

J. Crouch & Son was a partnership consisting of father and son. The father was a director in the plaintiff bank. No officer in the bank, other than director Crouch, had any knowledge of defendant Grigsby, nor was any inquiry made concerning his solvency or otherwise. The cashier of the plaintiff testified that he alone transacted the business for the plaintiff in the purchase of such note, and testified to his good faith and want of knowledge of any infirmity. The burden of proof being upon the plaintiff at this point, the credibility of the cashier was fairly a question for the jury, to be determined in the light of the circumstances here indicated. The case at this point is quite controlled by our previous holdings: *Bushnell v. Buck Bros.*, *supra*; *Iowa National Bank v. Carter*, 144 Iowa 715, 722; *Arnd v. Aylesworth*, 145 Iowa 185, 191; *McNight v. Parsons*, 136 Iowa 390, 399; *Bennett State Bank v. Schloesser*, 101 Iowa 573; *Commercial Bank of Essex v. Paddick*, 90 Iowa 63, 66; *Frank v. Blake*, 58 Iowa 750; *City Deposit Bank v. Green*, 130 Iowa 384; same case, 138 Iowa 156, 161. To the same effect, see the following from other jurisdictions: *Citizens Sav. Bank v. Houtchens*, 116 Pac. 866; *Johnson County Sav. Bank v. Rapp*, 91 Pac. 382; *Bank v. Walker*, 72 Atl. 579; *New England Mortgage Sec. Co. v. Gay*, 33 Fed. 636, 649; *Shellenberger v. Nourse*, 118 Pac. 508; *Bluthentahl v. Columbia*, 57 So. 814; *Winter v. Nobs*, 24 Ann. Cases 302, 304, 305; *Parsons v. Jackson*, 99 U. S. 434; 7 Cyc. 953; *Ireland v. Scharpenberg*, 103 Pac. 801; *Nat'l Bank v. Kirby*, 108 Mass. 497; *Merchants Nat'l Bank v. Wadsworth*, 131 N. W. (Mich.) 1108; *Union*

Nat'l Bank v. Malliouz, 132 N. W. (S. D.) 168, 174; *Citizens Sav. Bank v. Couse*, 124 N. Y. Supp. 79; *City Nat'l Bank v. Winsor*, 133 N. W. (Minn.) 961; *Park v. Winsor*, 132 N. W. (Minn.) 264.

The Negotiable Instrument Act is intended to give negotiability and mobility to commercial paper, and, therefore, to extend protection to innocent holders thereof in good faith and in due course. But it is not intended as an aid or shelter to the creation of a litigating agency. If, therefore, the note was negotiated to avoid defenses thereto, and the purchaser had notice, the statute affords it no protection.

We do not overlook the fact claimed on behalf of plaintiff and the payees that the defendant had not threatened to make defense, at any time prior to the transfer of the note, but that he had asked for an extension of time. The plaintiff is entitled to the benefit of this circumstance before the jury, but it is by no means so conclusive as to entitle it to a directed verdict.

If the jury should fail to find any fraud either in the inception of the transaction or in the negotiation of the note to avoid defense, then the burden would rest upon the defendant to show that the plaintiff was not a good-faith holder in due course. Even from that point of view, we are convinced that the circumstances shown are sufficient to carry the question to the jury.

For the reasons indicated, the order directing a verdict for the plaintiff was erroneous. The judgment entered thereon must, therefore, be—*Reversed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

HENRY VANDEWATER, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

EMINENT DOMAIN: Railways—Right of Way—Abandonment of
1,3 Work—Reversion of Title—Return of Condemnation Money. A railway right of way, acquired by condemnation proceedings, reverts to the owner from whose land such right of way was carved when the construction of the railway has "commenced," and such construction abandoned and not in good faith resumed for eight years (Sec. 2015, Code 1897), and the title to such right of way may be quieted in such owner, even though he has never been disturbed in his possession of the land embraced in such right of way, and even though he declines to return the money paid him on the original condemnation.

DEEMER, C. J., and SALINGER, J., dissent.

EMINENT DOMAIN: Railway Right of Way—Statute of Limita-
2 tion—"Commencement of Construction." Sec. 2015, Code 1897, providing that if the construction of a railway has "commenced" and such construction ceases and is not in good faith resumed for eight years, the right of way acquired by condemnation shall revert to the owner of the land from which such right of way was taken, becomes operative from the time construction work commences on any part of the contemplated line as a whole. Such statute does not remain inoperative as to any particular tract simply because no construction work has been actually done on that particular tract.

Appeal from Adair District Court.—HON. W. H. FAHEY,
 Judge.

TUESDAY, JUNE 22, 1915.

ACTION to quiet title to land taken in condemnation proceedings for railway right of way, the plaintiff contending that the defendant had abandoned all right to the condemned land under the provisions of Sec. 2015 of the Code of 1897. Decree for the plaintiff. Defendant appeals.—*Affirmed.*

H. J. Chapman, F. W. Sargent, and Robert J. Bannister,
 for appellant.

Musmaker & Williamson, for appellee.

GAYNOR, J.—This is an action in equity to quiet title to a piece of land in Adair county. The plaintiff claims to be the owner of this land and alleges that the defendant com-

1, 3. EMINENT DO-
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pany makes some claim to it adverse to the plaintiff; that whatever interest defendant may have had in the land, its right to assert an interest is now barred by virtue of Sec. 2015 of the Code of Iowa. Plaintiff claims that he is the owner of quite a large tract of land; that in the year 1903, the defendant company caused a strip one hundred feet wide across plaintiff's farm to be condemned as a right of way for a line of railroad from Winterset to Greenfield, and that the work of constructing the road was commenced immediately after the condemnation, but was abandoned in the year 1903; that the road was never finished, used, or operated, and therefore the title of the railroad company acquired under such condemnation proceedings has been lost, and the title has reverted to the plaintiff. The defendant first assailed the petition by demurrer. This being overruled, the defendant answered, setting up that the plaintiff had never been disturbed in his possession; that the construction of the road had never been commenced over and across plaintiff's land; that, therefore, the statute of limitations had not commenced to run; that the plaintiff had been paid in full for the right of way, and never returned or offered to return the money received for it; and that there was no equity in plaintiff's claim. Upon these issues, the cause was tried to the court, a decree entered for the plaintiff, quieting title as prayed.

It appears without dispute that the defendant company acquired a right to the piece of land in controversy, through the exercise of the power of eminent domain; that the land in controversy was condemned by proper proceedings for the use of the railroad company for the building of a line of railway between Winterset and Greenfield; that the defendant paid to the plaintiff the full amount of the damages

awarded. It appears that, after the defendant's right to proceed with the building and construction of the railroad had been ascertained and determined, and the damages paid, the defendant commenced the construction of the road between Winterset and plaintiff's farm, and did work upon the road, in the way of construction, up to within about two miles of the land in controversy; that it also began the construction and building of the roadbed between Greenfield and plaintiff's land, and within about a mile of the land in controversy. Between plaintiff's farm and Winterset, there was about 10 miles of grading and work done in preparing the roadbed. There was no grading and no work done on plaintiff's land, except that in the line of the right of way extending over plaintiff's land, the defendant had put stakes marking the right of way and fixing the grades. The land in question is about one and one-half acres. The biggest part of the road between Winterset and the land in controversy has been graded within two miles of plaintiff's land. Considerable grading had been done between Greenfield and plaintiff's land, the exact amount of which does not appear, but it did not reach within a mile from plaintiff's land. In the fall of 1903, the railway company quit the construction of the road from Winterset to Greenfield, and later gathered up all their material on the right of way used for construction purposes, and hauled the same away, quit the construction of the road and never have finished or used the same for railway purposes since 1903; that no part of the contemplated railroad from Winterset to Greenfield was ever used or operated.

Defendant presents three propositions for our consideration which it claims should be answered in the affirmative, and, being so answered, work a reversal of this case: First. There can be no abandonment where there has been no commencement of construction. Second. A part of a line of road can be abandoned without affecting other parts. Third. The plaintiff has never been disturbed in his possession.

Defendant says the construction of the road never having been commenced, the eight-year period for reversion does not apply. The eight-year limitation which works a reversion does not commence to run until after the construction of the road has been commenced and then abandoned.

The first question asked by appellant is, Can there be an abandonment of right of way when nothing has ever been done to take possession? and says, "This involves the further question of when, if there be an abandonment, the statutory eight-year period begins to run, and this in turn depends upon the meaning of the words, 'when construction is commenced.' " This, the defendant says, is the sole question presented by this appeal in its last analysis.

The right of eminent domain is a right exclusively vested in the sovereign power. Private property can only be taken for public use, and it must appear affirmatively, before private property of an individual can be taken against his will, that the use to which it is put is a public use.

Sec. 1995 gives to railway corporations the right to take and hold so much real estate as may be necessary for the location and construction or convenient use of its railways. This right is granted it by the state, and it is granted upon the theory that railway corporations are quasi public utilities; that the construction of these roads is for the convenience and welfare of the public. The right delegated is the right to take private property and hold it for a public use, and the companies are subject to state control under proper legislation. The right to take and the right to hold must depend upon the initial fact that the property is taken or held for public use, and not for private use, although there may be private gain in the operation of the road itself.

Sec. 2015 of the Code provides:

"Where a railway constructed in whole or in part has ceased to be operated for more than five years; or where the construction of a railway has been commenced and work on the

same has ceased and has not, in good faith, been resumed for more than five years, and remains unfinished; or where any portion of any such railway has not been operated for four consecutive years, and the rails and rolling stock have been wholly removed therefrom; it shall be treated as abandoned, and all rights of the person or corporation constructing or operating any such railway, over so much as remains unfinished or from which the rails and rolling stock have been wholly removed, may be entered upon and appropriated as provided in the next section. If the railway or any part thereof shall not be used or operated for a period of eight years, or if, its construction having been commenced, work on the same has ceased, and has not been in good faith resumed for eight years, the right of way, including the roadbed, shall revert to the owner of the land from which said right of way was taken."

Sec. 2016 provides:

"In case of abandonment, as provided in the preceding section, any other corporation may enter upon such abandoned work, or any part thereof, and acquire the right of way over the same, and the right to any unfinished work or grading found thereon, and the title thereto, by proceeding as near as may be in the manner provided in this chapter; but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway, which has not been refunded by them, shall not be permitted to recover the second time. The value of such roadbed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed for the benefit of the former company or its legal representative."

As we understand and interpret these statutes, the first provisions of Sec. 2015 may be divided as follows: Where a railway, constructed in whole or in part, has ceased to be operated for more than five years, the right of the party

condemning it for a public use, and the rights acquired to construct a railroad for a public use, are to be treated as abandoned as to that company; and this is true where the construction of the road has been commenced, and work on the same has ceased, and has not in good faith been resumed for more than five years and remains unfinished, or where any portion of such railway has not been operated for four consecutive years, and the rails and rolling stock have been wholly removed therefrom. .

The right of a railroad company to take private property rests upon the thought that the taking is for a public use, and is to be devoted to a public use. The mere taking for a public use serves no public purpose. The public is served when it is devoted to the use on which the right to take depends. When the right to take for a public use is given, the obligation to devote it to a public use is created, and that it will be so used is implied. The legislature, then, when it granted to railway companies the right to take private property for public use, undoubtedly intended that it should be put to a public use when taken. It had, therefore, a right to limit the time in which the company, as a pledge of good faith in the taking, should devote it to the public use for which it was taken, and had a right to say to the company exercising this power, "You may take private property for a public use; but if you do so, you must devote it to the public use for which it was taken. If you fail to do this, the property shall revert to the person from whom you took it," and the state did say to this company, and to all companies, "When you take private property for a railway, and the railway or any part thereof shall not be used or operated for a period of eight years, or if, having commenced its construction, you cease to work it, and do not in good faith resume the work for eight years, the right of way acquired by your condemnation proceedings, and the roadbed shall revert to the original owner." The statute gives to the condemning company eight years in which to demonstrate its good faith in

taking, and if it fails to do this for five years, any other company (the land having been properly condemned for public use) may enter upon the condemned land and continue the work and devote it to the use for which it was originally taken. But if neither the condemning company nor any other company does avail itself of the provision and demonstrate its good faith by complying with the requirements of the statute, then at the end of eight years, the right acquired in the condemnation proceedings will be deemed to have been abandoned, and the property reverts to the original owner.

Unquestionably, the statute gives to the condemning company eight years in which to demonstrate its good faith in the taking of the private property by devoting it to the public use. If, after five years, it becomes apparent from its conduct, as recited in the statute, that it has not and is not devoting it to the public use, then the door is open to any other company to come in and complete the purpose of the condemnation by devoting the condemned property to the public use for which it was taken; but if neither the taker nor some other company having authority to act enters upon and devotes it to the public purpose, then it will be deemed that the public purpose for which it was taken has been abandoned, and the property reverts.

The company acquired this right to take this property through the state, and under the statute hereinbefore set out. It lost its right by its failure to devote it to the public use for which it was taken. Its right to take came from the state. It lost its right by failing to comply with the conditions imposed by the state upon the exercise of its right. The same power that gave the right is the same power through which it is taken away.

Sec. 2016 in its provisions has relation to the first part of Sec. 2015. The last paragraph of Sec. 2015 is an independent provision limiting the right of a railway company, after condemnation proceedings, to eight years in which to use and operate its road, and in which to devote the property

taken to a public use. It expressly says, "If the railway or any part thereof shall not be used or operated for a period of eight years, the right of way, including the roadbed, shall revert to the owner of the land from which it was taken, or if, its construction having been commenced, work on the same has ceased and has not been in good faith resumed for eight years, the land reverts to the original owner."

This, we think, is consistent with the holding in *Remey v. Iowa Central Ry. Co.*, 116 Iowa 133; *Gray v. Iowa Central*, 129 Iowa 68.

It is said, however, that the eight-year statute of limitations does not commence to run until the construction has been actually commenced, and work thereafter has ceased and

2. EMINENT DOMAIN: railway right of way: statute of limitation: "commencement of construction." has not been continued in good faith or resumed. This railway company undertook to build a road from Greenfield to Winterset. They had a right of way surveyed, marked out by stakes, indicating the direction of the

road, the territory over which it would pass, and its limits. To construct this railway, it was necessary to commence somewhere. They did commence at Winterset, and, as we take it, at Greenfield, and constructed a roadbed a large portion of the way between Winterset and the land in controversy, and a large portion of the roadbed between Greenfield and this land. To say that they had not commenced the construction would be to say that the construction was not commenced until the whole roadbed had been built. To say that the words "the construction" of a railway (to start the limitation against any particular landowner) required that the building of some portion of the road had been commenced on his land would be an unreasonable limitation on the words, "its construction having been commenced." Its construction means the construction of the contemplated railway. We find nothing in this point made by appellant, and it is not necessary to go into a discussion as to whether the stakes on plaintiff's land were grade stakes or survey stakes. The construction of the

contemplated road had been commenced. The work had ceased, and had not been resumed in good faith at the time this action was commenced.

It is next contended that the plaintiff is not entitled to maintain this action because he has not refunded the money received by him from the defendant. There is no provision

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in this statute for the refunding of the money by a landowner in the event the condemning company has failed for the statutory period to devote the condemned property to the public use. The company simply has lost its right by its failure to devote the land to the purposes for which it was taken, and when it lost its right, by the terms of the statute, the land reverted to the original owner, and nothing can be added to the plain wording of the statute by construction.

It is contended that the holding in the *Remey* case is inconsistent with what was said by this court in *Noll v. Ry. Co.*, 32 Iowa 66; *Dubuque & D. Ry. Co. v. Diehl*, 64 Iowa 635, and *C. M. & St. P. Ry. v. Bean*, 69 Iowa 257. As to this, we are prepared to say that in so far as these cases are inconsistent with the holding in the *Remey* case, they are hereby overruled.

The main questions considered are so fully discussed in the previous case of *Remey v. Iowa Central Ry. Co.*, *supra*, that we do not feel that anything farther need be said, and the case is therefore—*Affirmed*.

LADD, WEAVER, EVANS and PRESTON, JJ., concur.

DEEMER, C. J. (dissenting).—I. This case is peculiar in its facts, and in the relief asked and granted. It appears that plaintiff, who has in no manner been disturbed in his possession of a strip of land condemned for a railway, and who received full compensation, not only for the strip, but for all damages incident to the permanent use of the right of way for railway purposes, is permitted not only to use the land

but to have his title thereto quieted against the condemnor, without any proof of abandonment by the railway company, save as it is claimed there was an abandonment under certain sections of the Code, to which reference will hereinafter be made, notwithstanding he has had full payment for the land and full enjoyment, not only of the land, but of the money paid him therefor as well, since the land was sought to be condemned.

Plaintiff is in a court of equity asking that the title be decreed in him, because it is equitable for him to have it under the circumstances disclosed. I do not think it either right or equitable that he should have both the land and the money; and unless there be some express statutory provision giving it to him, I think he should be defeated.

Plaintiff does not claim an abandonment save under Sec. 2015 of the Code, referred to by the majority; and that his petition does not make out a case of abandonment under the general law is clear.

In the absence of statute, the mere fact that a railway is not built over a condemned strip of land for a period of thirteen years is not an abandonment. *McClain v. C. R. I. & P. Ry. Co.*, 90 Iowa 646; *Barlow v. C. R. I. & P. Ry. Co.*, 29 Iowa 276. And this is especially true where the owner of the servient estate does no act to prevent its use. *Noll v. D. B. & M. R. R. Co.*, 32 Iowa 66, and cases cited.

Plaintiff has done nothing to prevent the actual use of the land; and according to the testimony, has never been disturbed in his possession. If his claim of title were founded on adverse possession, which presumes a grant, his action would necessarily fail.

II. But it is said that Secs. 2015 and 2016 entitle plaintiff to the relief demanded. These sections do not, to my mind, cover the case: first, because work was never commenced upon the strip of land in controversy; and, second, because plaintiff has never refunded the purchase price of the land,

and therefore is not entitled to "have his cake, and eat it too."

This matter has been thoroughly considered in many cases which have heretofore reached this court in other forms, and they are not in harmony. See cases heretofore cited, and *C. M. & St. P. Ry. Co. v. Bean*, 69 Iowa 257; *Dubuque R. R. v. Diehl*, 64 Iowa 635; *Remey v. R. R.*, 116 Iowa 133; *Fernow v. R. R.*, 75 Iowa 526. Other cases, not officially reported, were affirmed by operation of law because of an equal division of the court. My views upon the statutes now under consideration are fully expressed in the dissenting opinion in the *Remey* case, *supra*.

Aside from this, our difficulties in the past are not necessarily involved here. This case involves the single proposition: May one who has had full pay for his land, taken for railway purposes, after the lapse of eight years, no work having been done upon the land at any time, have his money and the use thereof, and at the same time have a decree quieting title to the land itself on the theory that he has again become the owner of it by reason of abandonment? I do not think there is any case so holding, and am of opinion that the petition should have been dismissed.

I would therefore reverse the judgment.

SALINGER, J., joins in this dissent.

EARL H. WOODWORTH, Appellee, v. IOWA CENTRAL RAILWAY
COMPANY et al., Appellants.

RAILROADS: Sales—Entire Assets of Grantor—Grantee Assuming

- 1 **Liabilities—Privity of Contract—Fraud on Creditors:** The absolute assumption by a grantee of the payment of all the existing liabilities of a grantor, and the agreement by such grantee to indemnify and hold grantor harmless from any such liabilities, in consideration of the transfer to grantee of all the assets of the grantor, creates something more than a mere "contract of indemnity" for grantor. By such assumption, the grantee puts

himself, practically, into the shoes of grantor. Such a contract creates a right of action in favor of such creditors against grantee. This is true even though an attempt is made to limit the promise to pay and indemnify by a clause "that nothing in such contract shall be construed as giving any other person than grantee and grantor any right, remedy, or claim," as such latter clause, in so far as contradictory of the former clause, will be rejected as a fraud on grantor's creditors. So held where one railway company bought all the assets of another railway company.

PRINCIPLE APPLIED: Plaintiff, having been negligently injured, had a cause of action against a railway company of which he was an employee. Later, the company sold its entire railway, including all assets, to another railway company. The grantee assumed the payment of all liabilities of the grantor arising out of the operation of the railway and agreed to "indemnify" and save harmless the grantor against any and all such liabilities. This agreement was the very essence of the consideration. A later clause provided that nothing in the contract of sale, expressed or implied, was intended or should be construed to give to *any* person, other than to the grantor and grantee, any right, remedy, or claim. *Held*, (a) the latter clause, in so far as in conflict with the first clause and as nullifying it, must be rejected as fraudulent, (b) the first clause was not a *mere* indemnity clause, but a clear assumption of liability, and (c) a privity of contract arose, under the first clause, between plaintiff and the purchasing company, and plaintiff could maintain his action against both companies.

ACTIONS: Joinder of Causes and Parties—Ex Delicto—Ex Contractu—When Permissible. A creditor, in an action sounding in tort against his debtor, may join one who, by contract, has assumed and agreed to pay the debts of the said debtor. (Sec. 3545, Code 1897.)

PRINCIPLE APPLIED: (See No. 1.)

ACTIONS: Improper Joinder of Parties or Causes—Waiver. Objection to the improper joinder of (a) parties or (b) causes of action must be raised *before* answer or the objection will be waived. (Secs. 3547, 3548, Code.)

EVIDENCE: Negligence—Notice of Defects—Other Similar Defects. Evidence of defects, similar to but at other places than the particular defect relied on as constituting negligence, existing at different points throughout a large part of defendant's railway switching yards, but in the near vicinity of the place of accident,

is admissible to show notice to defendant of the existence of the particular defect relied on as constituting negligence, especially where the cause was tried on the theory that evidence of "notice" was necessary.

EVIDENCE: Negligence—Notice of Defect—How Proven: Notice
5 to defendant of a defect on which negligence is predicated may be shown by plaintiff, both in the form of (1) actual knowledge to defendant of such defect and (2) constructively—that is, from the nature of the defect—defendant not having the legal right to dictate the *quantum* of proof which plaintiff shall offer in support of a fact in issue.

PRINCIPLE APPLIED: Plaintiff, an employee of a railway company, was injured by reason of a "sag" or low place in the railway track, causing the engine to lurch and throw plaintiff off the engine. The defect proven was such as to charge the defendant company with a duty to discover and to know of it. *Held*, defendant could not properly complain because plaintiff did not choose to rest on "constructive" notice of the defect, but proceeded farther in his evidence and introduced evidence tending to show "actual" notice.

EVIDENCE: Expert Evidence on Nonexpert Question—Expert Draw-
6 **ing Only Inference Jury Could Draw—Effect.** Expert inferences from certain assumed facts, being the only inferences which the jury could draw from such facts, if believed by the jury to be true, are, while erroneously received, nonprejudicial.

PRINCIPLE APPLIED: Plaintiff claimed there was a "sag" in the track and that, as the engine passed over the sag it "lurched" and threw him off and injured him. He so testified. Later, as an expert, he was permitted to testify that an engine of that type and going at that speed would not, going over the track, "lurch" without striking a "sag" and that he would not have fallen from the engine had it not "lurched." *Held*, while there was nothing in the case calling for expert testimony, yet under above rule the error was nonprejudicial. (The court says: "There was nothing in such opinion as given by the plaintiff that was fairly calculated to corroborate him or to aid his credibility.")

MASTER AND SERVANT: Negligence—Personal Injury—Contra-
7 **dictory Statements—Evidence—Sufficiency.** Evidence reviewed and held sufficient to support verdict for personal injuries, notwithstanding statements by plaintiff alleged to be wholly inconsistent with his testimony on the trial.

PLEADING: Ambiguity—How Construed. An ambiguous pleading
8 will be construed against the pleader.

PRINCIPLE APPLIED: Plaintiff, in a personal injury action, pleaded negligence in that defendant allowed a "sag" to exist in its track, which caused the engine to lurch and throw him off. Defendant pleaded that plaintiff had knowledge of the condition of the yards and track and assumed the risk incident to his employment "in the said yards," and the "dangers and hazards incident to riding over the tracks in their then condition," and that if defendant was negligent, the plaintiff was aware of the danger arising from such negligence and assumed the risk of the same. Defendant claimed this constituted a pleading of the assumption of risk "*incident to the employment.*" *Held*, the pleading, being ambiguous, should be construed as pleading the assumption of risk "*incident to the negligence of defendant.*"

MASTER AND SERVANT: Assumption of Risk (a) Incident to Em-
9 **ployment and (b) Incident to Negligence—Distinction.** "Assumption of risk incident to employment" and "assumption of risk incident to defendant's negligence" are two vastly different matters; the former is not an "assumption of risk" in its *true* sense. The latter is. For a master to say "The servant assumed the risk incident to his employment" is simply another way of saying, "I deny that I was negligent."

MASTER AND SERVANT: "Assumption of Risk Act"—Negligence
10 **—Risk "Incident to Employment"—Necessity for Instructions.** The "assumption of risk" abolished (except under the imminent danger clause) by Chap. 219, Acts 33d G. A. (Sec. 4999-a3, Sup. Code, 1913), is that risk which is incident to the *negligence of the master*. The latter clause, viz., "this statute shall not be construed so as to include such risks as are incident to *the employment,*" is precautionary only. In such sense, it is not superfluous, but if said clause was omitted, the above construction would be inevitable. No instruction need be given on the effect of this last clause in the absence of a request therefor.

DAMAGES: Personal Injury—Instructions Permitting Speculation—
11 **Future Pain.** Whether an instruction permitting a recovery for such "pain and suffering as plaintiff *may* endure in the future" escapes the vice of opening the door to mere speculation by the limitations (a) "as shown by the evidence," (b) "if any he will suffer in the future," and (c) "all as established by the evidence," *quaere*.

DAMAGES: Personal Injury—Instruction Permitting Speculation—

- 12 **Future Suffering—Hopelessly Permanent Injuries.** An instruction, if faulty because opening the door to mere speculation, in that it allowed a recovery for such future suffering as "may" be sustained in the future, is rendered unobjectionable in instant case by the fact that plaintiff's injuries were hopelessly permanent.

TRIAL: Instructions—Correct Though Inexplicit—Special Instruc-

- 13 **tion—Necessity for Request—Waiver.** If an instruction is correct as given, though not as explicit as desired, request *must* be made for the more explicit instruction, or waiver will be the penalty.

PRINCIPLE APPLIED: In instant case, the instructions on the measure of damages in a personal injury action were correct as far as they went, but failed to limit the amount of recovery to the *present worth*. No request was made for a more explicit instruction. *Held*, error could not be predicated on the lack of specification.

DAMAGES: Excessive Verdict—Permanent Injuries.

- 14 A verdict of \$22,000 sustained. Plaintiff lost both legs. At the time of the accident he was 26 years old. He had exclusively fitted himself for railroading, and was receiving \$111 per month when hurt.

Appeal from Hardin District Court.—HON. C. E. ALBROOK, Judge.

WEDNESDAY, NOVEMBER 25, 1914.

REHEARING DENIED TUESDAY, JUNE 22, 1915.

ACTION for damages for personal injuries to plaintiff resulting in the loss of both legs. At the time of the accident, the plaintiff was an employee of the defendant, engaged in the performance of his duties as switchman. There was a verdict and judgment for plaintiff. Defendant appeals.—*Affirmed*.

C. H. E. Boardman, F. M. Miner and W. H. Bremner, for appellants.

Kelleher & O'Connor, Williams & Huff, Halloran & Starkey, for appellee.

EVANS, J.—The accident in question occurred on April 11, 1910, in the railroad yards of the defendant at Oskaloosa. The defendant's switching crew consisted of two helpers and a foreman, besides the engineer and fireman. The plaintiff was one of the helpers, and was engaged in the line of his duty at the time of the accident. He was riding on the front footboard of the switching engine and was thrown off, as alleged, by the lurching of the engine, and was thrown in such a way that the wheels of the engine passed over his legs. The charge of negligence against the operating railway company is based upon the specifications that the track at the place of the injury was dangerous by reason of "low joints" in the rails, and that the speed of the engine was excessive in view of such condition of the track. The defendants denied all negligence and pleaded contributory negligence and assumption of risk.

There are two defendants, the Iowa Central Railway Company and the Minneapolis & Saint Louis Railroad Company. The first named was the operating railway company at the time of the accident, whose employee the plaintiff was. Before the suit was brought, the other defendant became the purchaser from the Iowa Central Railway Company of its railway and all its assets. As a part of the consideration therefor, it assumed all liabilities of the selling company. It is on this ground that the plaintiff claims to recover from both defendants on his alleged cause of action against the selling company.

The immediate circumstances of the accident were detailed by the plaintiff as a witness, as follows:

"I then got on the front end of the engine standing on the footboard, on the left-hand side—the east side. Mr. Andrews was on the right-hand side, and Mr. Frey was on the right-hand side, next to the drawbar. We were all on the footboard, on the head end of the engine that morning. I was on the left-hand side and the other two men were on the

right-hand side. The footboard is about the width of the rails—a little wider—four or five feet. It does not extend out as far as the pilot beam, and it was about ten inches short, I think. That morning we came up to High Avenue, a distance of about three blocks, and stopped. The foreman told us to go in on the house track. We stopped at High Avenue to pick up the foreman. Mr. Andrews got on the engine at First Avenue. The engine started south, and had run about 225 to 300 feet when the accident happened. The grade is very nearly level. If there is any grade at all, it is down grade. The engine was running approximately 8 miles an hour. The engine is generally pretty quick to pick up. Mr. Quackenbush was the engineer and Landfear was the fireman. The engineer is on the right-hand side when the engine is headed south. The fireman is on the left-hand side. I was on the fireman's side. It was about 6:05 to 6:15 when the engine started. Mr. Andrews started to get off. It was my duty to follow the engine foreman, Mr. Andrews. When Andrews started to get off, I started to get off, too. I did not think the engine was quite as far down as it was with reference to soft spots or low joints. We hit a low place in the track. The engine seemed to lurch forward and down, and my starting to get off it jerked me loose from the grabiron or handhold. Immediately before, my left hand was on the grabiron. That is the ordinary position in getting off. Just before that time, one hand was on the pin lifter and the other was on the grabiron. That is not the ordinary position in riding on an engine. I was listening to a conversation between Mr. Andrews and Mr. Frey. Andrews stepped off on the right-hand side. I started to get off on the left-hand side. I was accustomed to getting on and off an engine moving at that rate of speed. There was not anything in the rate of speed at which the engine was moving that was likely to throw me, and that was an ordinary place to step on or off the engine, moving at that rate of speed. When I started to step off, the engine seemed to dip down on my side, on the

left-hand side. The point where the engine seemed to dip down was at this soft spot—the soft spot where I got injured. That was between 225 and 300 feet south of the First Avenue crossing. That is the same soft spot as I described as being in the vicinity of where water had stood. The rail was ordinarily depressed at that point about $2\frac{1}{2}$ to $3\frac{1}{2}$ inches. The engine seemed to go down. It threw me loose. I was thrown forward, out of the rail. My body was on the outside of the rail. My legs were across the rail. I was in a position at right angles to the rail, my feet a little bit towards the engine. The pony trucks are about 16 or 18 inches from the front of the footboard. When I found myself falling, I tried to throw myself out of the way. The next thing was, it sort of all became blank; when I seen the engine was going to get me, I don't remember anything until the boys picked me up."

Other facts and the evidence relating thereto will be set forth later in the discussion of the alleged errors complained of by appellant.

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| 1. RAILROADS :
sales : entire
assets of
grantor :
grantee as-
suming lia-
bilities :
privity of
contract :
fraud on
creditors. | - 1. The first contention of the appellants is that the Minneapolis Company is in no manner subject to the plaintiff's suit, because of an express provision in its contract of purchase. The third and eighth clauses of the deed or contract whereby the one company purchased from the other were as follows : |
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"Third. The grantee hereby assumes the payment of all the current and ordinary charges, costs, liabilities and expenses of the grantor arising out of the operation of the railroad and property of the grantor and remaining unpaid at the date of the execution and delivery of this indenture and agrees to indemnify and save harmless the grantor from and against any and all such charges, costs, liabilities and expenses.

“Eighth. Nothing in this indenture expressed or implied is intended or shall be construed to confer upon or give to any person or corporation other than the parties hereto their successors and assigns any right remedy or claim under or by reason of this indenture or under or by reason of any covenant condition or stipulation herein contained, all the covenants, conditions and stipulations contained in this indenture being for the sole and exclusive benefit of the parties hereto, their successors and assigns.”

The third clause is that upon which the plaintiff relies in asserting his claim against the Minneapolis Company. The eighth clause, above quoted, is that upon which the Minneapolis Company bases its denial of liability to the plaintiff. It is quite clear that the third clause, in the absence of the eighth, is sufficient to render the purchasing company liable to plaintiff for whatever amount was justly due him from the selling company. The defendant does not contend otherwise. Its contention is that the eighth clause completely negatives such liability to the plaintiff and confines the liability of the Minneapolis Company to the Iowa Central Company alone. That the terms of the eighth clause will bear such construction must be conceded. If such construction be given to it, its practical effect is to contradict and nullify completely the third clause. The Iowa Central Company turned over to the Minneapolis Company all its assets of every kind. It has nothing left but its name and its legal entity.

Ignoring the eighth clause, the contract, on its face, was just and free from fraud as to creditors of the selling company. If such eighth clause is to be construed as depriving such creditors of all right to avail themselves of the other provisions of the contract, then it was manifestly fraudulent on its face as to such creditors. In view of the conflicting provisions of these two clauses, one must necessarily give way to the other. The assumption of the liabilities of the selling company by the purchasing company was of the very essence

of the consideration. The undertaking was presumably equivalent to the benefit received. To enforce clause eight as construed by the appellants would be to defeat and to defraud every creditor of the selling company by rendering him dependent upon the mere grace of his debtor.

The precise question here presented was involved in *Hipwell v. National Surety Company*, 130 Iowa 656. It was there held that a condition similar to clause eight herein could not be enforced, because the same was in conflict with the covenants of the contract. That case is quite decisive of the point here presented. The cited case quite answers, also, the argument of appellant herein that the contract before us was one of mere indemnity for the selling company, and not of payment to its creditors. The contract in the *Hipwell* case was one of indemnity by an indemnity insurance company. The only consideration received by the insuring company was a comparatively small premium. The Minneapolis Railroad Company, appellant herein, is not an indemnity insurance company. Its undertaking was not entered into for a premium. Doubtless it is not empowered to undertake indemnity for a premium. Its contract herein is one of indemnity only in the sense that when one party, for a consideration, assumes to pay the debt of another, he does agree to indemnify and hold harmless to that extent. Such a contract is not one of *mere* indemnity, whereby the indemnifying insurer contemplates in his own favor the contingency that no loss or liability may arise, and in consideration of such contingency, accepts from the insured a small premium as a consideration for carrying the risk of a larger loss.

The contract before us dealt with accrued and existing liabilities. The purchasing company agreed to assume the same, not upon a contingency of their future arising, and not for a premium percentage, but for a consideration received in advance, presumably equal to the obligation assumed. If the contract should be construed as one of mere indemnity, and nothing more, as contended by the Minneapolis Company,

then no cause of action could arise thereon, even in favor of the Iowa Central Company, until it had actually paid in full its liability to the plaintiff herein. Having surrendered to the Minneapolis Company all its assets, it could, therefore, never pay such liability, and thereby mature a cause of action for indemnity.

We are clear, therefore, that, so far as clause eight contradicts the covenants of clause three, it must be ignored. Ignoring such clause, the authorities are abundant that a privity of contract arose between the purchasing company and the creditors of the selling company, whereby the creditors became entitled to enforce their claims by action against the purchasing company. *Knott v. Ry. Co.*, 84 Iowa 462; *Malanaphy v. Mfg. Co.*, 125 Iowa 719; *Weiser v. Ross*, 150 Iowa 353; *Beeson v. Green*, 103 Iowa 406; *Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147; *Hanlon v. Smith*, 175 Fed. 192; *Dancel v. Goodyear Shoe Machinery Co.*, 144 Fed. 679, 680; *Billmyer Lumber Co. v. Merchants' Coal Co.*, 66 S. E. 1073, 1077; Thompson on Corporations, Secs. 6082, 6083, 6089, 6096.

2. It is further urged that, even though the Minneapolis Company be liable, under the provisions of the contract in question, there was a misjoinder of causes of action, as well

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| <p>2. ACTIONS:
joinder of
causes and
parties: <i>ex
delicto</i>; <i>ex
contractu</i>;
when permis-
sible.</p> | <p>as of parties, because the liability of the first named defendant was based on tort, and that of the second named defendant, upon its contract of assumption. As an original proposition, the point is not without logical force.</p> |
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The question, however, was settled otherwise in *Knott v. Ry. Co.*, 84 Iowa 462. To the same effect, see *Hanlon v. Smith*, 175 Fed. 192. Neither did the defendant

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| <p>3. ACTIONS:
improper
joinder of
parties or
causes:
waiver.</p> | <p>raise the question of misjoinder in the lower court, as required by Secs. 3547 and 3548.</p> |
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The alleged misjoinder, if any, was apparent upon the face of the petition, and could have been raised in the manner pointed out by the statute. Under such statute, it must, therefore, be deemed waived.

3. As already indicated, the charge of negligence against the operating company was predicated upon a defect in the track which allowed the end of one rail to sag. This condition resulted, as claimed, from lack of ballast or other support. The plaintiff introduced evidence tending to show such defect at the place of the accident. He also introduced evidence of similar defects in other places in the near vicinity of the place of the accident. Such evidence covered a large part of the switching yard.

4. EVIDENCE:
negligence:
notice of de-
fects: other
similar de-
fects.

In the first instance, this line of evidence was introduced without objection. Later, objection was interposed to further testimony of the kind, because not confined to the place of the injury. Such objection was overruled, and complaint is now based on such ruling. Such evidence was offered and received on the theory that it tended to prove notice to the company. In its final argument before us, the appellant takes the ground that there was no burden of proving notice upon the plaintiff, and that such evidence was, therefore, irrelevant and incompetent. In putting forth this proposition, the appellant has quite changed front. The case was tried in the court below on the theory, apparently acquiesced in by both parties, that it was incumbent upon the plaintiff to prove notice of the defect complained of. The trial court so instructed the jury.

In appellants' opening argument filed in this court, they specifically challenged the sufficiency of plaintiff's proof of such notice. We quote the following from such argument:

"What proof is there that there was a defective track at the place of the injury?" "What proof is there that defendant had any notice of that defect?"

If proof of notice was necessary, then the line of evidence objected to was properly received for that purpose. If it was not legally necessary, the defendants were not prejudiced by the undue burden laid upon the plaintiff. If the defend-

ants had chosen to take the position in the district court which they have finally taken here, that no proof of notice was necessary, they could readily have eliminated such evidence.

Aside from all this, it is plain that notice of a defect, either actual or constructive, is ordinarily one of the elements of negligence predicated upon such defect. Where the facts

5. EVIDENCE: negligence: notice of defect: how proven. are such as to charge a defendant with a duty to discover and to know a defect, notice will be implied without other proof. In such case, it would be immaterial whether there was actual notice or not. The constructive notice would be sufficient. There is no rule, however, which would preclude the plaintiff from proving actual notice as well as constructive notice, even though, because of such constructive notice, proof of the actual notice were unnecessary. On the proposition that notice in some form is an element of negligence, such as is herein involved, see *Case v. C. R. I. & P. Ry. Co.*, 64 Iowa 762, 763; *Baldwin v. R. R. Co.*, 68 Iowa 37, 44; *Kuhns v. R. R. Co.*, 70 Iowa 561, 566; *Brownfield v. C. R. I. & P. Ry. Co.*, 107 Iowa 254.

4. Appellants complain of certain expert testimony given by the plaintiff himself as a witness. After showing his seven years' experience as a switchman, his counsel put to him the following hypothetical questions, which were answered, over objections herein shown:

6. EVIDENCE: expert evidence on non-expert question: expert drawing only inference jury could draw: effect.

Q. "Basing your answer upon your knowledge, observation and experience, what would you say to the jury as to whether an engine of that type, that you were riding on that morning, would lurch without striking a depression in the track, going at the rate of speed that it was proceeding, substantially eight miles an hour?" (Objected to as immaterial, incompetent and irrelevant, asking for the conclusion and opinion of the witness, incompetent under the issues in this

case, not a proper subject for expert testimony. Objection overruled. Defendant excepts.) A. "No, sir, it would not. . . ." Q. "Mr. Woodworth, what do you say to the jury as to whether or not you would have been thrown down, or fallen down in front of the engine, at the time of the accident, if the engine had not lurched, as you have described here in your testimony?" (Objected to as incompetent, immaterial and irrelevant, calling for the conclusion and opinion of the witness and not for any fact, not a proper subject of expert testimony; no proper foundation laid for the introduction of the testimony, and seeking to invade the province of the jury, and places the witness in the place of the jury. Objection overruled. Defendant excepts.) A. "No, sir, I would not."

Technically, we think the objection to each question ought to have been sustained. The plaintiff had testified that there was a depression at the place of accident, and that the engine did lurch as the wheels passed over it. There was nothing left for expert opinion. As to the second question, the plaintiff had already testified, in substance, that the lurching of the engine threw him. His testimony as to the circumstances excluded every other cause. There was nothing left for expert opinion there. On the other hand, such questions and the answers thereto could not have worked any possible prejudice to the defendant. It may be justly urged for appellants that such testimony was argumentative, but in this regard it was within the latitude of the discretion of the trial court. The inference drawn thereby was ordinary and nonexpert, and doubtless ought to have been left to the jury; but it was the only inference which the jury could draw, if it accepted the previous testimony of the plaintiff as to the facts. There was nothing in such opinion as given by the plaintiff that was fairly calculated to corroborate him or to aid his credibility, and nothing therein that could prejudice the defendants in the mind of the jury. The matter thus introduced was, therefore, plainly inconsequential and nonprejudicial.

5. Appellants urge the insufficiency of the evidence as a whole to sustain the verdict. It is not denied that there is a conflict in the evidence. It is not denied that the evidence on behalf of plaintiff is sufficient to sustain the verdict, if it can be believed. But it is urged that the testimony of the plaintiff is contradicted by such overwhelming weight that it ought to be disregarded.

7. MASTER AND
SERVANT :
negligence :
personal in-
jury : con-
tradictory
statements :
evidence :
sufficiency.

The defendants introduced in evidence certain formal admissions made by the plaintiff and reduced to writing on three different dates. It is claimed that his present testimony is seriously contradicted by each and all of such written admissions. The first of these was a written statement by the attending physician, purporting to have been made upon information received from the plaintiff in response to inquiry. The particular feature of this statement, which is emphasized, was that plaintiff remembered nothing about the circumstances of the accident, and did not remember that he had gotten upon the footboard of the engine, and did not remember that he had come up to the engine, his last memory being that he was going toward the engine. Five days later, a second written statement was signed by the plaintiff, the particular feature of which was that, though he remembered going up to the engine and throwing his coat thereon, he did not remember that he got upon the footboard. A few weeks later, a third written statement was signed by him, the particular feature of which was that he remembered coming back to the engine and of getting on the footboard, on the east side, and that he remembered nothing more. This statement also contained the following sentence, upon which stress is laid: "I do not know what caused me to fall, unless it was my fainting away." The contention of appellants is that these statements are so contradictory and inconsistent with the plaintiff's testimony upon the trial that they should be deemed to nullify it entirely. Before considering this contention, a few things should be noted in a preliminary way. None of the

foregoing statements was written by the plaintiff, but the last two were signed by him. The first statement was the physician's memorandum of all the information he could get from the plaintiff on the evening of the day of the accident.

The accident occurred in the forenoon. The wheels took off the plaintiff's legs; it still remained for him to undergo a surgical operation under anaesthetics, later in the day, whereby a further amputation was made by the surgeon upon each stump. At the close of this day of ordeal, he was unable to remember anything about the circumstances of the accident, and unable to remember that he had even reached the engine. We find it quite impossible to doubt the candor of this statement, or to deem it incredible that plaintiff's memory could fail him at this time, and yet be restored to him later.

The second statement was signed five days later. The plaintiff testified that he remembered nothing about reading or signing such statement, and did not know of it until it was presented to him upon the witness stand. He admitted, however, the genuineness of his signature thereto. This statement reiterated his want of recollection of the circumstances of the accident. It advanced one step, however, from the first statement. This is the statement which declared that he remembered his going up to the engine and throwing his coat thereon, but did not remember his getting upon the footboard.

The third statement declared that he remembered his getting upon the footboard, but remembered nothing more. Between the time of the second statement and the third, plaintiff had undergone two surgical operations. There had been pus formation, and one limb, at least, had been honeycombed with drainage tubes. These tubes totaled a length of more than 100 inches. Needless to say, he had been a constant sufferer during the period covered by the statement. Accepting the declarations of all such statements as true at the time, they do no more than to indicate that the memory of the plaintiff as to the immediate circumstances of the accident was obliterated by some cause, either temporarily or perma-

nently. The testimony on both sides showed that he did come up to the engine and did get upon the footboard, and did ride thereon in a standing position, for a considerable distance. He testified on the trial that he then remembered such fact. The fact was concededly true. Was his testimony that he then remembered it necessarily inconsistent with his previous failure to remember the same under the conditions already named? It is by no means unusual for the shock of a severe accident to impair or obliterate the memory of the patient as to events immediately preceding the accident.

It was the contention of appellants, however, that the accident to the plaintiff was the result of a fainting spell. Evidence was introduced by the defendant along that line. It is the contention now that the sentence which we have above quoted from the third statement was an admission by plaintiff that his falling was caused by a fainting spell. We see no necessary inconsistency in such statement. It only purported to be a concession of a possibility. The defendant was entitled to its contention before the jury. Such question was submitted to the jury by a specific instruction, to which no objection is urged. The trial court expressly instructed that if the plaintiff fell as the result of a fainting spell, then a verdict must be returned for the defendant. We are clear that the case at this point presents only a conflict of evidence, and that the verdict has abundant support.

6. The defendants pleaded the defense of the assumption of risk. Such evidence was submitted to the jury by an instruction in purported accord with the provisions of Chapter 219, 33d G. A. The substance of such instruction was that such defense was not available to the defendant, unless the conditions at the place where the accident occurred were such that a reasonably prudent person of ordinary intelligence would not have continued in the prosecution of the work in which the plaintiff was at the time engaged. Appellants do not deny the propriety of this instruction, so far as the affirma-

8. PLEADING:
ambiguity:
how construed.

tive defense of assumption of risk in the strict legal sense is concerned. They contend, however, that they pleaded the other so-called assumption of risk, viz., the risk naturally incident to the employment, and that the effect of the court's instruction was to eliminate from the consideration of the jury both the assumption of risk incident to the negligence of the defendant, and the assumption of risk merely incident to the employment.

So far as the answer was concerned, it pleaded the defense of assumption of risk in one division only. It charged the plaintiff with knowledge of the condition of the yards and track, and averred that the plaintiff assumed the risk incident to his employment "in the said yards" and the "dangers and hazards incident to riding over the tracks in their then condition." It also charged that, if the defendant was negligent, the plaintiff was aware of the danger arising because of such negligence and assumed the risk of the same.

If the pleader intended to plead that assumption of risk which is merely incident to the employment, regardless of negligence, only a direct and unequivocal statement to that

9. MASTER AND
SERVANT: as-
sumption of
risk (a) in-
cident to em-
ployment and
(b) incident to
negligence:
distinction.

effect was necessary. As it is, the pleading is quite ambiguous, and must be construed against the pleader. The answer should be construed as pleading the assumption of risk only in its true sense. We have held repeatedly that there is no occasion for pleading

the assumption of risk incident to the employment. Such pleading adds nothing to the general denial and serves no function whatever. *Martin v. Light Company*, 131 Iowa 724; *Duffey v. Consolidated Block Coal Co.*, 147 Iowa 225. Inasmuch as such pleading, when made, presents no affirmative defense, and inasmuch as such allegation is mere surplusage, there can be no occasion for submitting the same to the jury as affirmative matter. While its legal proposition is sound, it inheres in the general denial, and should be submitted to the jury as such. This is only saying that a defendant cannot be

rendered liable by the mere fact of an accident to his employee, and that his liability can only arise upon a showing of negligence or wrong doing.

In this respect the instructions of the trial court were specific and emphatic, and no ground of complaint is urged at this point. It is argued, however, that under the present

10. MASTER AND
SERVANT: "as-
sumption of
risk act":
negligence:
risk "incident
to employ-
ment"—ne-
cessity for in-
structions.

statute, the court was required to submit to the jury the question whether the danger encountered by the plaintiff was one merely incident to his employment, the risk of which he therefore assumed. The statute relied on is Chapter 219, 33d G. A., already referred to.

Sec. 1 thereof is as follows:

"That in all cases where the property . . . of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, . . . to furnish reasonably safe . . . place to work, the employe shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employe may have had knowledge when the employer had knowledge of such defect. . . . Nor shall the employe under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; *but this statute shall not be construed so as to include such risks as are incident to the employment.*"

The last clause of the foregoing is relied upon by appellants as requiring the court to submit to the jury as an affirmative defense the assumption of risk incident to the employment. Such clause does not purport to add anything to what precedes it. It is precautionary only, and declares a construction or meaning to that which precedes it. The construction thus declared is the natural construction of the preceding lan-

guage used in the section. If the last clause had been omitted, the construction which it calls for would have been readily, if not necessarily, adopted without its mandate. Such section has reference to the affirmative defense of assumption of risk in its true sense, and to nothing more. Such is the construction recognized by the concluding clause referred to. If the defendant had requested a precautionary instruction at this point that was consistent with the statute, it would have been entirely appropriate. No such request was made.

Appellant's counsel did submit to the trial court certain requested instructions on the subject of assumption of risk, but these ignored the statute entirely and were inconsistent therewith.

7. Appellants complain of the instruction of the trial court on the subject of the measure of damages, in that such instruction permitted the jury to allow for any "pain and

11. DAMAGES:
personal in-
jury: instruc-
tions permit-
ting specula-
tion: future
pain.

suffering that he may endure in the future, as shown by the evidence in this case, if any he will suffer in the future, and for the depreciation, if any, in his earning capacity, all as established by the evidence admitted be-

fore you on this trial." It will be noted that the apparent vice in this instruction is in the use of the words "may endure in the future." The tendency of such words is to open the door to mere speculation, and we have so held in a number of cases. *Fry v. Ry. Co.*, 45 Iowa 417; *Ford v. City of Des Moines*, 106 Iowa 94, 96; *Sanders v. O'Callaghan*, 111 Iowa 574, 581; *Hall v. Ry. Co.*, 115 Iowa 19; *Williams v. Clarke County*, 143 Iowa 328, 330.

It will be noted that some limitation is put upon the terms thus used by the clauses, "as shown by the evidence" and "if any he will suffer in the future," and "all as established by the evidence admitted." Whether these limitations are sufficient to differentiate the instruction from the cases above cited is a close question.

In *Bailey v. Centerville*, 108 Iowa 20, 28, it was held suffi-

cient to limit the future pain to a time "as long as it will probably continue."

In some of the cited cases the objectionable expression was coupled with the limitation "as shown by the evidence." This was held insufficient.

We are not disposed to go any further than our previous cases in the finding of error at this point, because of the technical character of the error. We incline to the view that we would be going somewhat farther than heretofore if we were to hold that the limitations above quoted were insufficient to save the instruction from condemnation.

There is, however, another feature of the case that, to our minds, is quite conclusive, and we prefer to rest our holding thereon. The pain and suffering for which compensation may

be allowed is such as is incident to the injury. The future pain to be considered is such as is incident to the duration of the injury complained of. The duration of the injury includes the future inconvenience, the loss of time and earning capacity, the impairment of the enjoyment of life, and the physical pain and mental anguish arising out of such a situation. The future duration of a personal injury and of the suffering arising therefrom is often a question of mere opinion, based to a greater or a less extent upon speculation, and submitted to the jury upon conflicting evidence.

In the case before us, the question of the permanency of the injury is not open to difference of opinion or speculation or conflicting evidence of any kind. So conclusive was the fact that no distinctive evidence was offered upon it by either party. The plaintiff's injury was the loss of both his legs. Being necessarily permanent, nothing could be added to it, even by speculation of the jury. The impairment and inconvenience and anguish are inseparable from such permanency. We think, therefore, that in a case of indisputable permanent

12. DAMAGES :
personal in-
jury : instruc-
tion permit-
ting specula-
tion : future
suffering :
hopelessly
permanent
injuries.

injury, such as the loss of bodily members, there is no room for prejudice in the form of the instruction here used.

8. It is next urged by appellants that the court failed to limit the amount of recovery to the *present worth*. The instruction at this point is similar to that involved in the case of *Breen v. Iowa Central Ry. Co.*, 159

13. TRIAL: in-
structions:
correct though
implicit:
special in-
struction:
necessity for
request:
waiver.

Iowa 537. In discussing this question in the *Breen Case*, we said: "The further complaint is made of the instructions as to the measure of damage in that the recovery for future damage 'was not limited to present

value.' The language of the instruction given by the trial court is quite general at this point and is as follows: 'Such a sum as in your judgment will be fair compensation for the injuries which said Kelleher sustained.' That the rule or measure of damage contended for by appellant at this point is the correct one may be conceded. *Dougherty v. Railway Co.*, 137 Iowa 257, 14 L. R. A. (N. S.) 590, 126 Am. St. 282; *Williams v. Clarke County*, 143 Iowa 328, 330. It is not claimed that the instruction of the trial court contradicts this rule. It only lacks in specification. This question was considered by us in *Greenway v. Taylor County*, 144 Iowa 332, where substantially the same language was used. In that case, we held that the instruction in itself was not erroneous, and that, in the absence of a request for more specific instruction, error could not be predicated upon its lack of specification. We think that case must be deemed controlling here, although we deem it a much better practice for the trial courts to be specific in their instructions at this point. So we said in the *Greenway Case* and in *Williams v. Clarke County, supra*."

In the case before us, there was no request for a more specific instruction. What we said, therefore, in the *Breen Case* above quoted is quite conclusive here.

9. Lastly, it is urged that the verdict is excessive. The trial court refused to reduce it. The verdict is very large;

it is for \$22,000. On the other hand, the injuries of the plaintiff are hopelessly great. At the time of the accident, he was twenty-six years of age, and was earning \$111 per month. Plaintiff had devoted himself exclusively to railroading and was not fitted for any other line of work. He was rendered totally unfit to pursue his occupation. At the time of the trial, two and one-half years had elapsed since the accident, and he had been a great sufferer. That his disability and suffering must continue is undisputed. The magnitude of the verdict, therefore, though very great, has substantial support in undisputed facts.

We see no legitimate ground for our interference with it. The judgment below must be—*Affirmed*.

LADD, C. J., WEAVER and PRESTON, JJ., concur.

WILLIAM CALLAHAN, Appellee, v. THE CITY OF NEVADA, Appellant.

MUNICIPAL CORPORATIONS: Public Streets—Use for Private Purpose—Permit or License—Revocability. Licenses or permits to use portions of a public street for private purposes are revocable, irrespective of the necessity or convenience of the private party. A public street, the title to which is in the municipality, is held in trust for *public* uses only.

PRINCIPLE APPLIED: A two-story building with basement, facing east on a corner lot in the main part of the city, was built in 1893, with an areaway or stairway *in the street*, both on the east and on the south of the building. Both afforded access to the basement, and the one on the east also afforded light to the basement, and was guarded with iron railing. The owner, apparently, did not obtain the consent of the city, nor did the city, apparently, enter any objection. Twenty years later, the city adopted an ordinance regulating areaways and the like, and providing for the revocation of permits therefor. The city afterwards closed the east areaway, only. *Held*, the city was within its rights.

Appeal from Storey District Court.—HON. R. M. WRIGHT, Judge.

WEDNESDAY, JUNE 23, 1915.

SUIT in equity to enjoin the defendant city from closing an area or open stairway leading to a barber shop in plaintiff's building, which building abuts upon a business street in the city of Nevada. The trial court, upon the issues joined, granted the prayer of the petition, and the city appeals.—*Reversed and Remanded.*

J. R. Larson and C. G. Lee, for appellant.

E. H. Addison, for appellee.

DEEMER, C. J.—Plaintiff is the owner of a two-story and basement brick building, fronting upon the main business street of the city of Nevada. The lot upon which the build-

ing was erected is a corner one, Linn Street being in front of the building, and Second Avenue North being on the south side thereof. The building was erected in the year 1893, and in the basement, a room was fitted up for a barber shop. To this shop, there were two outside entrances; one on Second Avenue North, extending something like two feet and six inches into the street, and the other to the east, extending into Linn Street about three feet. The areaway at the front was eight or ten feet in length, and as the ceiling of the basement was but seventeen inches above the walk, the front areaway was used for light, as well as for an entrance to the building. The front areaway was protected on the sides by iron bars.

In the year 1913, the defendant city passed an ordinance, from which we extract the following:

“Section 1. Encroachment. No person, firm, or corporation shall create, construct or maintain upon or under the surface on any street, avenue or alley in this city, any chimneys, stairways, platforms, steps, areas, railings, grates, vaults, coal or boiler rooms, or any other encroachments of a

1. MUNICIPAL
CORPORATIONS:
public streets:
use for private
purpose: per-
mit or license:
revocability.

private or fixed character, unless written permit is granted to the owner of said property, by the City Council to maintain or construct the same.

"Section 2. Permit. No permission shall be granted or issued for any of the encroachments named in section one hereof, until plans for same complete in detail, shall have been filed with the City Council, and approved by said council and the City Engineer. All permits shall be in writing signed by the City Clerk and the City Engineer upon order of the City Council, said permit shall contain the name of the person, firm or corporation procuring the same, the date issued, the number, size and location of such encroachment as permitted, and also an agreement signed by such person, firm or corporation procuring the same, to hold the city safe from any and all damage which may be caused or occasioned by the construction of said encroachment.

"Section 5. Inspection. The committee on streets, avenues, or alleys is authorized to inspect at any time, the different encroachments mentioned in this ordinance, and to place in any area, vault or boiler room, or coal room, any pipes or conduits for carrying electric wires, gas or water, or to alter, extend, or repair such pipes or conduits; but such pipes or conduits shall at all times be placed so as to interfere as little as possible with the use of such areas or vaults, and the committee on streets, avenues and alleys is also authorized to enter said areas, coal or boiler rooms or vaults for any and all purposes connected with the legitimate use of such streets, avenues, or alleys.

"Section 6. Revocation of Permit. Should any encroachment authorized as above set forth, at any time conflict with the right of travel which the general public has in the streets, then and in that case the City Council may revoke any permit granted by the City Engineer and signed by the City Clerk and order the removal of said encroachment."

Plaintiff failed to prove that these areaways were constructed with the express consent of defendant's city council,

it gave him or his grantee in the premises. There is no statute in this state authorizing towns to grant to individuals the right to the use of their streets for private purposes. These municipalities hold the streets in trust for the public and cannot put them to any use inconsistent with street purposes. They have no implied power to grant privileges to use the streets for private purposes."

These quotations show the trend of our own cases, and they are quite generally followed in other states where the fee to public streets is in the city. *Sears v. City of Chicago*, 93 N. E. (Ill.) 158, 247 Ill. 204; *New York v. Knickerbocker Trust Co.*, 102 N. Y. Supp. 900; *Tacoma Co. v. Chicago*, 93 N. E. 153; *Smith v. Leavenworth*, 15 Kans. 81; *Smith v. McDowell*, 148 Ill. 51; *Deshong v. New York*, 176 N. Y. 475; *Jorgensen v. Squires*, 39 N. E. (N. Y.) 373; *Dell Rapids Merc. Co. v. Dell Rapids*, 75 N. W. (S. D.) 898.

While the title to streets and alleys in this state is as a rule in the municipality, it is in trust for the public, and the city cannot, in the absence of express legislation, do anything which will deprive the public of its paramount rights in the thoroughfares. It may, in its discretion, permit excavations under sidewalks and in its streets which do not interfere with public travel, and exact compensation for the use thereof, and may also license area and cellarways, and doubtless bay windows extending over streets and alleys, provided they do not unnecessarily interfere with the rights of the public; but no such license for a purely private purpose is irrevocable. The same power which grants the privilege may also recall it, and if one enters upon a street without permission and makes excavations therein or erects structures thereover, the governing body may, in its discretion, order the removal of the obstructions or the closing up of the excavations.

As the doctrine of ancient lights does not obtain in this state, and no property owner is compelled, when erecting his building, to afford an abutter either light or air, there is noth-

ing in plaintiff's proposition that the areaway in question should not be closed because it deprives him of light in his basement. It is admitted, both in testimony and in argument, that plaintiff has ample ingress and egress to and from his lot by the other stairway, which also extends into a public street, and no reason exists for preserving to him the use of the other. His counsel, while conceding the rules hitherto stated, contends that, because of the necessities and needs of such areaways in large cities, we should now adopt another rule and uphold the right to such use of the streets and announce the doctrine that such a license once granted is irrevocable when acted upon or when money has been expended upon the faith and belief that the method of entrance and the means of affording light would be permanent.

It is true that in *Perry v. Castner*, 124 Iowa 386, we said that "in the congested portions of large cities, the use of basements is of great value, and the construction of areaways seems to be a necessity." Whatever the rule for large cities, it cannot be made to apply to the case in hand, for the reason that no necessity which the law recognizes for the areaway is shown. It is not needed for access to the basement, and at most was a mere convenience to plaintiff. It may be observed, however, that some courts seem to hold that the larger the city, the more need for the full width of the street unobstructed by openings, bars or other impedimenta. *Jorgenson v. Squires*, *supra*. Indeed, the testimony of both legislative enactments and judicial decisions is to limit the abutter more and more, especially in the larger cities, where such obstruction tends to interfere with pedestrians in a much traveled street. McQuillan on Municipal Corporations, Vol. 3, Sec. 1343 et seq., and cases cited.

Nothing decided in *Perry v. Castner*, *supra*, runs counter to these views. On the contrary, in so far as it says anything about the rights of a city to remove such obstructions, it is in line with our holding here. The trial court was in error in granting the decree and the case must be reversed and re-

manded for a decree in harmony with this opinion.—*Reversed and Remanded.*

LADD, GAYNOR and SALINGER, JJ., concur.

STATE OF IOWA, Appellee, v. CHARLES CESSNA, Appellant.

HOMICIDE: Included Offense—Conviction of Offense Less Than
1 **Justified.** If evidence would justify a verdict of guilt of assault with intent to kill, defendant cannot complain that the jury returned a verdict of assault with intent to do great bodily harm.

CRIMINAL LAW: Invasion of Home—Intruders—Defense of Habitation—Degree of Force Permitted. One engaged in the commission of no offense may use force to protect his home from invasion by those who have entered without invitation and without indication as to their mission, and who are in good faith believed to be mere intruders. The degree of force permitted is that force which a reasonably cautious and prudent man would employ under like circumstances. As long as the force employed does not exceed this standard, he is guilty of no offense.

TRIAL: Instruction—Incorrect Instruction Suggesting Correct One
3 **on Vital Issue—Effect.** An incorrect requested instruction on a vital issue has the effect of calling the attention of the court to the point, thereby placing the court on its guard and necessitating a correct instruction on the point.

Appeal from Hamilton District Court.—HON. R. M. WRIGHT, Judge.

WEDNESDAY, JUNE 23, 1915.

THE defendant was accused of assault with intent to murder, and was convicted of an assault with intent to do great bodily injury. He appeals.—*Reversed.*

D. C. Chase, and R. G. Remley, for appellant.

George Cosson, Attorney General, W. S. Rankin, Special Counsel, and O. J. Henderson, County Attorney, for appellee.

LADD, J.—The defendant, with his family, resided in the second story of a flat, and at about 9 o'clock in the evening of October 29, 1913, Rufus E. Nelson, sheriff of Hamilton county, with his deputy, C. D. Carl, night policeman, Bert Williams, and Herman Rutledge, entered from the hallway a room about 18 feet long and 12 feet wide. Immediately thereafter, defendant came in through a door at the opposite corner and, according to the testimony of Nelson, said, "It's me you are looking for, is it?" and pointed an army gun at Carl, who cried, "Cessna, don't shoot." Nelson moved a little toward him, when he turned the gun on Nelson, and, as some of the witnesses say, the hammer clicked as though he had pulled the trigger. He was then overpowered; but, as is said by witnesses for the state, told his son to get the gun and "shoot these fellows," and also asked for a knife, declaring, "I will cut the guts out of the g— d— s— of a b— of a Norwegian." No information had been filed against the defendant, and he was not informed by the sheriff or any other of those present that they were officers. The evidence on behalf of the state tended to show that the defendant was not intoxicated, and Robertson, who was visiting at the place with defendant's father-in-law, testified that before the officers came, defendant had said that "if that marshal comes up here tonight I am going to kill him. I am going to spill his blood on this floor."

It seems that Mrs. Cessna had become frightened because of defendant's having been drinking during the day, and had called the night policeman. On the other hand, defendant testified that on the way home from doing carpenter work the day previous, he had noticed some geese flying and concluded to take his rifle with him to see if he could get some of them; that he cleaned up the gun, loaded it with five shells, put two quarts of whisky in his suitcase with some tools; but, as "it was kind of stormy," concluded not to go out, and, as he testified, "about 10 o'clock that morning when I found that I wasn't going back to work, I opened one of the quart bottles from my suitcase and began drinking. About 2 o'clock, I

lost that one, misplaced it, and so I opened the other one." He testified farther that he did not know how long he continued drinking, whether he ate dinner or supper or not, and that he had no recollection whatever of the sheriff and those with him having come to his house or entered the room or of anything whatever that occurred there, and he denied having made the threat testified to by Robinson.

I. Several questions are raised in the record, and the first of these is that the evidence did not justify a conviction of the particular offense of assault with intent to inflict great

bodily injury, it being contended that, as the gun was pointed at the head of defendant, he must have intended to kill, if he entertained any intent, and therefore could not have been guilty as found in the verdict. But the sheriff testified that "he pulled the gun on to Carl and on to me, and in the same position he had it on Carl," and that "he pulled the gun on to Carl." Carl testified that the gun was pointed at Nelson's head or upper part of his body when he snapped the trigger, so that the jury was not required to find that it was aimed at the sheriff's head, as assumed by appellant. There was room, then, to find his purpose as the jury found, and the defendant cannot complain if the jury was lenient in convicting him of a lower offense than it might under the evidence.

II. Appellant complains of the refusal to give the following instruction:

"You are further instructed that if you find that the sheriff and officers summoned a posse of citizens, and with them, they went to the home of defendant, and while there, without any warrant for his arrest, and while defendant was in no manner violating the law, and if, without first making themselves known to defendant and informing him the object of their visit, they endeavored to overpower and take him, then the resistance of the defendant was not unlaw-

1. HOMICIDE:
included of-
fense: convic-
tion of offense
less than just-
ified.

2. CRIMINAL
LAW: invasion
of home: in-
truders: de-
fense of habita-
tion: degree of
force per-
mitted.

ful, and if, in making such defence, defendant pointed a gun at the officers, he is not guilty of assault with intent to murder, or assault with intent to commit manslaughter, or assault with intent to do great bodily injury, or of simple assault, and must therefore be acquitted by you."

Though this does not correctly state the law, it did direct the attention of the court to a very important issue, which was not alluded to in the instructions. The defendant was in his own dwelling and not engaged in the commission of any offense. The sheriff with his posse entered in the night-time without any intimation as to their purpose, and, as might have been found, unknown by defendant to have been officers of the law. Had the sheriff intended to arrest him, he should, if afforded an opportunity so to do, have so informed him, and also of the cause of the arrest, of his authority to do so, that he was a peace officer and that defendant must submit. Sec. 5199, Code. Being unaware that he was about to be arrested, the defendant might have assumed that the sheriff and his posse were intruders and have taken such reasonable precautions to protect his home as an ordinarily cautious man would under like circumstances. The doctrine that every man's house, however humble, is his castle and he may protect it against invasions had its origin when the peace of the body politic as well as of individuals depended on the maintenance of the inviolability of houses as castles, and it still exists with equal reason for the maintenance of the inviolability of houses as homes. 1 Wharton's Crim. Law, Sec. 634. A person when assaulted in his habitation is not required to retreat, but may meet force with force. *State v. Middleham*, 62 Iowa 150; *State v. Bennett*, 128 Iowa 713. And he may defend his habitation, not as property, but because this may be necessary to the protection of himself and family. The principle is well expressed in *State v. Patterson*, 45 Vt. 308, 12 Am. R. 200:

3. TRIAL: Instruction: incorrect instruction suggesting correct one on vital issue: effect.

“The idea that is embodied in the expression that a man’s house is his castle is not that it is his property, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such an assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view, it is said and settled that, in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.”

Of course, one who is lawfully in a habitation must have warning to leave before force may lawfully be applied, but this having been done, force reasonably and apparently necessary to expel may be resorted to. But if the person or persons entering or who have entered are intruders and violent, and there without right, then such warning is not essential, and the same rule with respect to the application of force is applicable. The rules are accurately stated in 1 Bishop’s New Crim. L., Sec. 859:

“If a man enters another’s dwelling house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein. Yet if the entry itself is with violence, or is opposed, no request to depart need precede the act of turning out; since the tres-

passer knows, as well without express words as with, that his absence is desired."

The jury might have concluded that defendant was unaware that the persons entering were officers and supposed them mere intruders; and if so, should have been instructed that if they so found, defendant might, in repelling them from his dwelling, resort to such force as a reasonably cautious and prudent man would have done under like circumstances, and that if defendant so did, and did what such a man would have done, he should be acquitted; and on the other hand, if excessive force was used, or if such cautious and prudent person would not make use of the gun as defendant did, the defendant should have been convicted.

The record, in view of the request, was such as to exact the submission of this issue to the jury, and the omission so to do was error. In view of another trial, it is suggested that the jury be instructed concretely instead of abstractly as to the intent with which defendant may have acted.—*Reversed*.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

THE STATE OF IOWA, Appellee, v. FRANCISCO GIUDICE, Appellant.

CRIMINAL LAW: Change of Venue—Assignment for Trial in Other

1 **County—Effect of Order.** A valid order made by the district court of the county to which a criminal cause had been sent on change of venue, assigning said cause for trial on a certain date, is in no wise affected by the fact that the court of the other county, in ordering the change of venue, also entered an order that the cause be tried on the same date. Both courts having made the same order, the first order could have had no other effect than to notify the accused that he could expect a trial in the other county on said date.

JURY: Summoning During Term Time—Power of Judge. The judge
2 of the district court may, during term time, order additional jurors to be summoned. (Sec. 347, Code 1897.)

JURY: Temporary Discharge—Power to Compel Return. Jurors, so

3 long as they have not been discharged, may be required to return and sit in any case. It is wholly immaterial that the jurors may have been temporarily relieved from duty and paid for their services to date.

JURY: Competency—Reading Newspapers—Opinion—Bias. The

4 formation of an opinion from reading newspaper accounts of an alleged crime and defendant's connection therewith does not, *ipso facto*, disqualify a juror when he (a) has no acquaintance with the defendant, (b) entertains no bias or prejudice, (c) has no personal knowledge of the facts and (d) is able to give and will give defendant a fair trial.

JURY: Competency—Race Prejudice. Race prejudice does not,

5 *ipso facto*, disqualify a juror. The suggestion is offered that it will be more in harmony with the idea of absolute impartiality to select juries with no unkind feelings toward the class to which defendant belongs.

CRIMINAL LAW: Evidence—Manner of Inflicting Wound. A physi-

6 cian who has personal knowledge of the nature of the wound inflicted on deceased, there being no eyewitnesses, may testify that such wound could, in his opinion, have been inflicted by a certain instrument *used in a certain manner*,—for instance, by a razor held in the hands of a person standing behind the deceased.

JURY: Objection to Separation During Trial—Duty of Court and

7 Counsel. It is the duty of the court in a criminal cause to take the *full responsibility* for ordering the jury kept together, on request of either party. It is equally the duty of counsel not to parade before the jury the fact that *he* is perfectly willing that the jury separate, thereby throwing upon the other party the odium of having requested the order. Violation of this duty *held* nonreversible error because the objection to the separation of the jury was withdrawn.

HOMICIDE: Identity of Accused and Assailant—Range of Cross-

8 Examination. Questions tending to rebut, impeach, modify, explain or in some way qualify the statements made on direct examination constitute legitimate cross-examination.

PRINCIPLE APPLIED: The deceased rushed into a round-house with his throat cut and, pointing to his wounds, said, "Dago! Dago!" and almost immediately expired. Trouble had occurred between the deceased and the accused. A witness testi-

fied that the accused went by the name of "Dago." *Held*, accused had the right to inquire as to the number of other men in the same yards who went by the name "Dago."

WITNESSES: Examination—Objections by Different Associated
9 **Counsel—Statute.** It is not improper for more than one counsel to enter objections to proceedings. Sec. 3700, Code 1897, requiring that but one counsel on each side shall examine the same witness, has no application to the making of objections.

APPEAL AND ERROR: Showing of Prejudice—Necessity. The
10 court must have something more than a mere guess on which to hang a holding of prejudice.

PRINCIPLE APPLIED: Accused was on trial for homicide. The state, over objection, proved that when Exhibit "A" was signed, no promises were made. But what Exhibit "A" was did not appear. Again: Over objection, some history concerning "a paper" was detailed. But, again, the nature of "the paper" and its relation to the case did not appear. Again: The sheriff, over objection, testified that he removed the defendant from Council Bluffs to Atlantic and thence to Logan, the latter change being made because the newspaper reporters had discovered the whereabouts of the accused. *Held*, in each case, nothing appeared on which to hang the conclusion of prejudice.

CRIMINAL LAW: Crime Committed—Subsequent Demeanor of Ac-
11 **cused—Admissibility.** Defendant's actions and demeanor immediately after the commission of an offense are a legitimate subject of inquiry; for instance, that, on being informed of the death of the deceased, he hurriedly dressed and left his stopping place.

CRIMINAL LAW: Questionable Conduct—Severe Characterization
12 **by Opposing Counsel—Effect.** The law is partial to the truth. If counsel's conduct during the progress of the trial is very largely a matter of "hot air," it is not reversible error for the opposing counsel to so characterize it.

HOMICIDE: Exhibits Connected with Offense Charged—Proper
13 **Identification.** Evidence reviewed and held to show such connection as to justify the admission of a razor and bloody pillow slip.

CRIMINAL LAW: Evidence—Res Gestae Doctrine Applied. Res
14 **gestae**, a frequent test, "were the facts talking through the party, or the party talking about the facts?"

PRINCIPLE APPLIED: Deceased stated to two different witnesses that he was "going down Avenue I." This would take him past a woodpile where it was claimed the accused assaulted deceased and cut his throat. Immediately after making the statement, he left the room, and immediately thereafter rushed back into the office with his throat cut. *Held*, admissible as part of the *res gestae*.

CRIMINAL LAW: Trial—Prejudicial Argument. The object of a
15 change of venue is to avoid prejudice and thus assure to the accused an absolutely fair and impartial trial, and the county attorney who, in the trial of the cause, attempts to restore prejudice against the accused by parading before the jury the fact that the accused has taken a change of venue, falls far short of the high ideals and spirit of fairness which ought to characterize a public prosecutor. It is misconduct, though not necessarily prejudicial.

CRIMINAL LAW: Trial—Argument Aside Record—Prejudice.
16 Counsel for the state must keep within the record. The prompt granting of a new trial is the penalty, under the record, for bitterly assailing the accused, during argument, for offenses and lecherous and scandalous conduct of which the record was barren of evidence.

CRIMINAL LAW: Trial—Improper Argument—Waiver—General Ex-
17 **ception.** Objection to an improper argument should, it is true, be made when the argument is made, or a waiver of the objection will result, but this rule is sufficiently complied with when, in order to avoid interruptions, it was agreed that the accused should have an exception to all parts of the opposing argument.

Appeal from Mills District Court.—HON. THOMAS ARTHUR,
Judge.

WEDNESDAY, JUNE 23, 1915.

THE defendant was convicted of murder in the first decree, and appeals.—*Reversed and Remanded.*

George Cosson, Attorney General, and John Fletcher,
Assistant Attorney General, for appellee.

John J. Hess, for appellant.

LADD, J.—Howard Jones was employed in firing a switch engine at the yards of the Chicago & Northwestern Railway Company in Council Bluffs, and on the evening of May 27, 1913, shortly after 11 o'clock P. M., rushed into the foreman's office in the roundhouse with his throat cut. He was excited and tried to talk, pointed at his throat and said, "Dago, Dago," seized a pen and tried to write, but fell on the floor and died before the physician reached him. The defendant, who is an Italian, had been employed by the railroad company, and on May 13th previous, Jones had directed him to put a headlight reflector on an engine. Defendant refused to do so and was told by Jones that unless he did, he would "turn him in to McCaw," the general foreman. Subsequently Jones did so, and the defendant was suspended from employment. The theory of the prosecution was that defendant killed Jones in revenge. The errors assigned will be taken up in the order argued.

I. The indictment was returned June 6, 1913, and five days later, the defendant was arraigned and entered a plea of "not guilty." A motion for change of venue from Pottawattamie county was filed on the 13th of the

1. CRIMINAL
LAW: change of
venue: assign-
ment for trial
in other
county: effect
of order.

same month, and on the 16th of June, the court ordered that the cause be transferred to the district court of Mills county and "specially assigned for trial before said court on Monday, June 23, 1913, and that if the regular spring term has been finally adjourned that a special term be and is hereby called to begin on said day for such trial, and that if the regular term is still open, then court reconvene on said day for such trial, and that the jury be summoned forthwith to appear on said trial on said day, any judge of the district court making any order with reference thereto which he may deem proper." On the same day his honor, Judge E. B. Woodruff, one of the judges of the district, addressed an order to the clerk of the district court of Mills county, directing that "the record show that such district court is adjourned

until June 23d at 9 o'clock A. M. for the purpose of the trial of the case of the *State of Iowa v. Frank Giudice, alias Henry Wiley*, and for the transaction of any other business that may

- come before the court." And another order was entered, directing that 30 additional jurors, as provided by law, be drawn for the trial of said cause and summoned to appear at 9:30 o'clock, June 23, 1913, and also that the original panel for the April term, 1913, not heretofore excused by the court, be summoned to appear at the same time. The record showed that the jurors in attendance at the said term drew their compensation on April 30th and had not appeared thereafter until the morning of June 23d.
2. JURY: sum-
moning during
term time:
power of judge.
3. JURY: tempo-
rary discharge:
power to com-
pel return.

Appellant contends that the district court of Pottawattamie county, after having entered the order transferring the cause to Mills county, lost jurisdiction of the same, and that the portion of the order assigning the cause for trial on June 23d was without jurisdiction and deprived the defendant of a reasonable time within which to prepare for trial. While the district court of one county may not bind the court of another by entering an order with reference to the transaction of business in the other county, yet the portion of the order objected to had the effect of carrying to defendant notice of the time the cause would likely be called for trial, and this being true, the order of the court of Mills county, upon convening, June 23, 1913, that the trial proceed at once, was without prejudice in not affording the defendant at least the intervening time to prepare for trial, and there is no showing whatever that this did not afford the defendant ample time in which to prepare for his defense. The order directing the drawing of 30 additional jurymen was not without jurisdiction even if made in vacation; for Sec. 347 of the Code expressly authorizes the judge, either before or during the term, to order as many additional jurors drawn for the trial of any particular case as may be deemed necessary. See

State v. John, 124 Iowa 230. Though the jurors of the original panel had drawn their compensation April 30th, for services already rendered, they had not been finally discharged, and we know of no reason why the jury, when temporarily excused, may not be required to return and sit in any case properly before the court and not disposed of. *State v. Phillips*, 119 Iowa 652. Such is the practice with grand jurors. *State v. Disbrow*, 130 Iowa 19. As the jurors had not been discharged for the term, they were competent to sit in the trial of any cause which it might be found necessary subsequently to try, and there was no error in re-summoning them for the determination of the case at bar.

II. The defendant exercised all his peremptory challenges, and now complains of the ruling of the court on challenges for cause as to several of the jurors. These jurors

4. JURY: competency: reading newspapers: opinion: bias. had read newspaper accounts concerning the killing of Jones and the connection, if any, of defendant therewith, and thereon had formed an opinion. None were acquainted with defendant, nor entertained bias or prejudice against him, nor had personal knowledge concerning the facts, and asserted that they were able to accord him a fair and impartial trial. Without reviewing the cases, it is enough to say that there was no abuse of discretion in overruling all the challenges for cause save that about to be considered. *State v. Young*, 104 Iowa 730; *State v. Hassan*, 149 Iowa 518.

5. JURY: competency: race prejudice. III. The answers of H. B. Nutting for cause disclosed that he entertained a prejudice against the nationality of the defendant. He swore that prejudice against Italians was strongly fixed in his mind and had been entertained for some time.

Q. "And if selected as a juror you would have a prejudice against this man because of the fact that he is a member of the nationality to which he belongs?" A. "Well, only just as a nationality, yes, sir. . . ." Q. "And it would

be in your mind always in the consideration of this case, would it not, the prejudice you entertain?" A. "Well, I would not let that hinder." Q. "Isn't it a fact that the prejudice that you have would be with you during all this time?" A. "Yes, sir, I think so." Q. "And it would be in your mind during your consideration of the entire case?" A. "It would."

On further examination, he stated that he would not carry the prejudice in the jury box with him, would disregard and lay it aside, and that he had "no particular prejudice against defendant, and if selected as a juror would try the case fairly and impartially." After saying that he would continue to entertain the prejudice against the nationality, he was asked by the court:

"Do you think an Italian is entitled to a fair trial by this court?" A. "Certainly I do." Q. "Can you give one a fair trial?" A. "Yes, sir."

He stated farther that he had talked about the case and spoken about the prejudice mentioned.

Q. "Are you certain that you can entirely blot that (prejudice) out of your mind?" A. "Well, I don't think I could entirely blot it out of my mind." Q. "And you are absolutely certain that you could blot it out and remove from your mind the prejudice you say you entertain?" A. "Well, I would not promise that; no, sir." Q. "You would not be willing to state that you would entirely remove from your mind the prejudice that you entertain against this man because of his nationality?" A. "No, sir."

The challenge for cause was overruled. It will be observed that the juror did not indicate the nature of his prejudice, that he entertained none against the accused personally, and that he insisted that he could accord him a fair and impartial trial. In these circumstances, the rule is quite

well settled by the authorities that race prejudice will not disqualify the person called as a juror. In *State v. Casey*, 44 La. Ann. 969, the court said that "Race prejudice exists everywhere among all nations, who favor their own race and believe it is the favored and cherished race of the world. No man, because he thinks his own race superior to another, is disqualified as a juror on this account." In *Bass v. State*, 127 S. W. 1020, some of the jurors stated that they had a prejudice against the negro race socially, but not civilly or legally. This was said to have meant "that they would not recognize negroes as companions or associates but had no prejudice against the race which would influence or affect their action in respect to any right or rights under the law." In *State v. Green*, 129 S. W. 700, objection to the juror was that he refused to drink with a negro, and it was said that the mere fact that the juror refused to put himself on a social level with the negro did not disqualify him to sit in the trial of the cause and render a fair and impartial verdict. In *Johnson v. State*, 130 N. W. (Nebr.) 283, the juror, on *voir dire*, stated that he had a feeling of prejudice against the colored race, but had no prejudice against the defendant; and the court held that the so-called prejudice against the race was simply a feeling or belief that it was inferior to the white race, and that this fact would not affect his verdict, saying that, "Without doubt many white men have the same feeling as did juror Manguld, but this alone has never been considered sufficient to disqualify them from acting as jurors on cases where colored men have been tried for criminal offenses." In *State v. Brown*, 87 S. W. 519, the juror stated that he had some prejudice against the negro race, but that he had no bias or prejudice that would prevent him from impartially trying the case under the law and evidence. It was then said that "the statement of this juror as to his attitude toward the colored race must be treated as nothing more than a notification to appellant that while he had no prejudice against him and could impartially try his case, yet, in making

his peremptory challenges, the fact of the juror not being favorably impressed with the negro race might be taken into consideration," adding that while "technically the juror was not disqualified, it would be more in harmony with absolute impartiality to select a panel of jurors who have no unkindly feeling toward the class to which the defendant belonged." *Pinder v. State*, 27 Fla. 370, 26 Am. St. 75, often quoted as holding that race prejudice disqualifies a juror from sitting on the trial of a person belonging to such race, does not so hold. The refusal to permit the following question to be put to jurors was held error: "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?" Manifestly, a juror who could not give such a trial ought not to sit. In *State v. McAfee*, 64 N. C. 339, the defendant was a colored man, and the court refused to permit the following question to be propounded to a juror, i. e., whether he believed he could, as a juror, do equal and impartial justice between the state and a colored man; and for obvious reasons, the judgment of the trial court was reversed. In *Balbo v. The People*, 80 N. Y. 484, a juror in answer to a question said that it (Italian) "was a race that he was not particularly fond of, and did not think much of, judging from those we have here." And the court held that "the fact that the juror may have had some prejudice against the Italian race was not, we think, a disqualifying circumstance." See *Moore v. State*, 107 S. W. 540; 17 Am. & Eng. Ency. of Law, 1131. The text is to the effect that "one should not be excluded from jury service merely because he does not like or think highly of the race to which the defendant belongs."

The answers of the juror indicate no more than that on some grounds he did not like the Italian race, but the ground for this was not disclosed, and for all that appears, it may have been owing to a matter which did not affect in any way his obligation to accord defendant a fair and impartial trial.

In *State v. Buford*, 158 Iowa 173, the proposition was before this court, and it was held that, as the juror had no feeling or prejudice against the defendant owing to his race, no acquaintance with him and had no personal bias against him and said that he could give him as fair and impartial a trial as he could a white man, the court rightly held the juror qualified. Though of the opinion that technically no abuse of discretion in overruling the challenge for cause can be said to appear, we agree with the suggestion in *State v. Brown, supra*, that it would have been more in harmony with the idea of absolute impartiality to have selected a jury with no unkindly feeling toward the class to which defendant belonged. This is suggested in view of another trial, which must be accorded because of errors in other rulings.

IV. The physician who was called and reached the deceased immediately after his death testified that he found a wound on the left side of the throat an inch and a half deep,

6. CRIMINAL coming out on the right side not quite so
LAW: evidence: deep, that the exterior carotid artery was cut
manner of in- and the interior carotid artery was partially
flicting wound. cut, and that the windpipe was cut, and that he died from such wounds. After saying that the cut had been inflicted by an instrument with a sharp edge, he was asked: "Could a razor inflict that kind of a wound?" Over objection as being leading, suggestive, immaterial and irrelevant, he answered, "It could have been done so." He was then asked: "From the nature of the wound could that have been inflicted by a man coming up from behind and cutting him from behind?" Over objection to the question as calling for a conclusion and as speculative, and that the witness was incompetent, he answered, "It could have been done that way." There was no eyewitness to the occurrence, and, as the inquiry was as to whether the wound might have been caused by a razor, or by a razor in the hands of a person reaching from behind, we think the rulings correct. *State v. Baker*, 157 Iowa 126; *State v. Rutledge*, 135 Iowa 581; *State v. Seymour*, 94 Iowa

nent, as was also how many others and who were so alluded to, and we are of the opinion that the questions were not vulnerable to objection as not proper cross-examination. It may be that the name was applied to any Italians, but this did not indicate that there were any such working about the roundhouse. If there had been any such, the appellation "Dago," as repeated by deceased, may as well have had reference to one of them as to defendant. The court erred in excluding the evidence.

VII. The state was represented by four attorneys, and at times, questions propounded to a single witness were objected to by two or three of the attorneys for the state;

9. WITNESSES: examination: objections by different associated counsel: statute.

that is, separate objections were interposed by each, and this is complained of as constituting misconduct. If done in an ordinary manner, we see no objection to more than one attorney on a side interposing objections. All that the statute exacts is that "but one counsel on each side shall examine the same witness." The design of this statute is to obviate repetition and waste of time, which is likely if more than one participate in the examination of a witness. Here the witness was being examined by the attorney for the defense and the statute had no application; for the interposition of objections, though connected therewith, is no part of the examination.

VIII. A deputy sheriff of Harrison county, after stating that he was at the jail when Exhibit "A" was signed and heard the talk between the county attorney and defendant prior to the making thereof, was asked,

10. APPEAL AND ERROR: showing of prejudice: necessity.

"What, if any, promises were made by anyone present, by yourself, Mr. Rock, by Mr. Stuart or Mr. Capell?" Over objection as incompetent, immaterial and irrelevant and calling for a conclusion of the witness, the witness answered, "There were no promises made." Counsel for the defendant contends that this called for a conclusion as to what was said and that the witness should have been permitted to give the

conversation. What Exhibit "A" was, by whom signed or to whom no promises were made does not appear from the record, and even though the position of counsel be correct, there is no indication whatever that any prejudice resulted. The witness Stuart was permitted to state over objection that "A request was made for a paper and that it be delivered to Mr. Myers, deputy sheriff." Q. "What did he say he wanted it for?" This was objected to as incompetent, immaterial and irrelevant, and the objection overruled. A. "He said Mr. Wiley wanted to read over the statement." The defendant moved to strike the answer out, and Myers, the witness, was then permitted, over objection, to state that Wiley took it and went out of the dining room into the kitchen and jail. What the paper was or what Wiley did with it is not disclosed in the record, and its relation to the case is not disclosed. It is needless to say that, under these circumstances, we are unable to say that the ruling was erroneous, and even if it were, it does not appear to have been prejudicial.

The sheriff of Pottawattamie county was allowed to state, over objection, that he moved the defendant from Council Bluffs to Atlantic, and thereafter to Logan; that he made the latter change because of the newspaper reporters having located him. It is said that the purpose of the state in introducing this testimony was to get before the jury the fact that it was necessary for the sheriff to conceal defendant in order to protect him, and that unusual precautions were taken, owing to conditions, for the protection of defendant's life, and that it tended to inflame the minds of the jury and prejudice them against him. All shown was merely where he had been since the commission of the offense, and it seems to us that it is quite a strain on the imagination to attribute the change of location to the design mentioned. As the evidence had no bearing on the guilt or innocence of the defendant, it might well have been omitted.

One Porche testified that the evening before Jones lost his life, the defendant stated to him that he was "going to

kill him"; that he saw a razor in his pocket; that shortly after

11. CRIMINAL
LAW: crime
committed:
subsequent
demeanor of
accused:
admissibil-
ity.
- Jones' throat was cut, at about 12:10 o'clock A. M., he informed him that Jones had died and had written defendant's name, and that defendant said, "I will go to Dominic Sesto's." He was then asked: Q. "Did he

dress in a hurry?" This was objected to as leading and suggestive, and he answered, "Yes." There was no abuse of discretion in permitting the question, and it was competent as showing the conduct of the defendant immediately after the commission of the offense charged.

IX. On cross-examination by counsel for defense, the record is as follows:

Q. "You shot a man over at Folsom, didn't you?"

12. CRIMINAL
LAW: ques-
tionable con-
duct: severe
characteriza-
tion by oppos-
ing counsel:
effect.
- Mr. Capell: "Objected to as incompetent, immaterial and irrelevant."
Court: "Sustained."
Q. "Did you shoot a man over at Folsom by the name of Ralph Mesena?"

Mr. Genung: "Objected to as incompetent, immaterial and irrelevant and not proper examination."

Court: "Sustained."

Q. "Did you ever shoot any more than one man while you were at Folsom?"

Mr. Capell: "Objected to—"

Mr. Clyde Genung: "That is shooting hot air into here."

Court: "Objection sustained."

Mr. Hess: "I object to the statement of the various counsel on the other side of the table and object to it as misconduct."

Mr. Clyde Genung: "I think the court ought to take the attorney for defendant to task for insisting on sticking in that prejudicial stuff that he knows is not true."

Mr. Hess: "Let the record show that we except to the remarks of counsel for the great state of Iowa as prejudicial."

Mr. Ware: "You ought to make a general objection to everything we do and save this annoyance."

Mr. Hess: "I object to the remark of the assistant prosecuting attorney as misconduct and incompetent."

Q. "Isn't it a fact that you had trouble with Frank Mensena at Folsom and in connection with that trouble you shot him with a rifle?" (Objected to as incompetent, immaterial, irrelevant and not proper cross-examination.)

The Court: "Sustained."

Mr. Genung: "I think counsel for the defendant ought to be instructed to go on, where he has made his record."

The Court: "I guess there isn't anything pending."

Mr. Genung: "Let the record show that the state at this time asks the court to direct the defendant's counsel to desist from this line of cross-examination, having already made his record and ruling been had thereon, that the evidence is incompetent."

Mr. Hess: "The remarks of counsel are excepted to by defendant as misconduct and the counsel for the defense now asks the court to direct the various counsel on behalf of the state to desist from that kind of remarks."

The Court: "Well, the court does not see any occasion for making this special ruling except that there is nothing pending in the way of a question and we ought to proceed."

Counsel for the defendant except especially to the remarks of the attorneys for the state concerning "shooting hot air into the case," and "insisting on sticking in that prejudicial stuff that he knows is not true," and also the remark regarding the general objection. It will be noticed that, though the characterization of the efforts of the counsel for the defense was somewhat original, it described quite accurately what was being undertaken. He was propounding a line of questions which he must have known were improper and seeking to inject evidence in the case that had no place

there, and if the counsel for the state resorted to a severe characterization of what was being undertaken, it cannot be said to have been unjustifiable, in view of the circumstances, that the court, instead of forbidding that line of examination, simply ruled on the objections. It was an attempt to bring before the jury matters that had no place there, and, by a repetition of the questions in different forms, to impress the minds of the jury with the supposition that the witness had committed a crime, although this could not have been proven. There is no ground whatever for charging that counsel for the state went farther than they should in obviating this result. There was no misconduct on their part.

X. The defendant had been rooming at the house of Josephine Forragi, and she, after saying that she saw the razor in the hands of Tony Roberts on the morning following

the killing, was asked, "Did you see what Tony Roberts did with this razor?" Objection was overruled, and she answered: "I seen it as he walked out. Examined the pillow slip on the morning of the 28th, there was stain of blood. Exhibit 10 is pillow slip." Porche had testified that he had gone to defendant's room shortly after the occurrence and had seen the razor between the mattress and the pillow, and that in the morning, he saw the razor in the hands of the landlady, who was making the bed. This so far connects her testimony as to render it admissible.

One McGruder, a night clerk at the roundhouse, saw deceased at about 11 o'clock as he came from the roundhouse office, and heard an engineer ask him if he was going home.

To this he responded: "No, I want to go out Avenue I." An objection "as incompetent, immaterial and irrelevant" was overruled. The next question was, "What did he say?"

A. "He said he wanted to try to get a full month this month." The latter answer had no relation to the case, but it is said that the statement where deceased wanted to go had

13. HOMICIDE:
exhibits connected with
offense charged:
proper identification.

14. CRIMINAL
LAW: evidence: *res gestae* doctrine applied.

a material bearing, as that he went past a certain woodpile where the crime is alleged to have been committed. This was immediately before he returned to the same office with his throat cut, and we think so closely connected with the transaction as to constitute a part of the *res gestae*. One Skaith testified that he had a talk with deceased at the round-house, and, in response to a question, the latter said he was going home right away, "right down Avenue I," and that he left immediately and would pass to the south end of the woodpile. This evidence was admissible on the same ground.

Defendant undertook to have identified Exhibit 16 by the witness Stuart, but was not permitted by the court to do so. As we have no means of knowing what Exhibit 16 was, it is impossible to say whether there was error.

XI. The county attorney in his opening argument said, "I believe that Pottawattamie county owes to the citizens of Mills county, and to you jurors especially, an apology and an explanation of why we are here today; but I want to assure you, gentlemen, that it is through no solicitation on the part of the prosecuting attorney that we are here today." This was objected to as misconduct, and it was such. The evident purpose was to make capital out of the fact that defendant had procured a change of venue to Mills county. It was of no concern to the jury how the cause came to be there and no apology was due from anyone for its being there for trial. It was enough that the court had ordered it to be tried in Mills county. Possibly no prejudice is to be inferred, but it is preferable to avoid "peanut" practice in the trial of causes, especially wherein guilt or innocence of grave charges is to be determined.

In the course of the closing argument, L. T. Genung, assisting in the prosecution, said:

"Mr. Hess says he will make no allusion to this woman, Mrs. Coffman. You have no right to make any allusion with

15. CRIMINAL
LAW: trial:
prejudicial
argument.

reference to Mrs. Coffman. When your client will lay his hand on another man's wife, with her little child by her side, to seduce her away from her husband in the dead of night, for only a purpose that he knew in his heart, then you come in and criticise! Ruin a man's home, defile his wife, and then come in and criticise her! I pity the woman who falls from grace with a child by her side, led on by a villain who has no respect for the family circle and home, to take her out and destroy her. You (indicating the defendant) not only ruined the Coffman home, but another home. . . . Now, does it appear to you why he wouldn't take a day job? Why, isn't it reasonable to assume from the testimony that if he was out with this Mrs. Coffman, and if he lived there within three doors of Mrs. Coffman and had such control over her that he could order her to meet him at the theater that night; that he could direct her to take her child to her home—out where no human eye could see; and he compelled to work days, what does that mean? Why, it means that this defendant's time, it is put in at work at the same time Mrs. Coffman's husband, who was a teamster driving a team in the daytime was engaged, and their nights would be spent at home. But reverse it. Let him work nights and Mr. Coffman days—think of the opportunity to him for his hellish purpose."

The only foundation for this to be found in the record is the testimony of Frances L. Coffman, to the effect that she knew defendant, had seen him frequently, "saw him the day Howard Jones was killed, at my home in the morning and along toward evening. Saw him at the Majestic theater that evening. He was with Antonio Roberts. A friend of mine, Mrs. Lane, was with me. We left the theater at about 9:30. We walked around a while until about 10 o'clock, or a little after. Had talk with defendant about Howard Jones. Said he thought he ought to get even with Jones for making him lose his job. I told him not to do anything to Jones."

This gave no warrant for what was said. He was bitterly assailed for offenses concerning which there was no proof and could properly have been none, and there is no escape from the conclusion that what was

17. CRIMINAL
LAW: trial:
improper
argument:
waiver: gen-
eral excep-
tion.
- said was extremely prejudicial. But the attorney general suggests that no exceptions were taken at the time. True, but it was

agreed that, to avoid interruption, defendant might have an exception to everything that was said, and the misconduct was one of the grounds on which the motion for new trial was based. In this state of the record, the state is in no position to insist that objection should have been made. The misconduct was so manifestly prejudicial that the citation of authorities is unnecessary. Because of the errors pointed out, the judgment is reversed and the cause remanded.

DEEMER, C. J., GAYNOR and SALINGER, JJ., concur.

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TO

ADOPTION

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Negotiation of note: Liquidation: Reissue by maker: Position
3 **of last transferee.** One who receives a promissory note *from the maker* in part payment of a debt due from the maker cannot establish that he is a "*holder in due course*" by showing that said note had, prior to the time he received it, been held by other "*holders in due course*." When the note found its

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 way back into the hands of the maker, such former holdings
 "in due course" lost their former force and effect, even though
 the maker did reissue the note. *Builders Co. v. Weimer*, 444.

"Holder in due course": Original holder. The original payee or
 4 bearer of a negotiable promissory note, in possession thereof,
 is a "holder." (Sec. 3060-a191, Sup. Code, 1913.) It requires
 one more step or transfer to create a "holder in due course,"
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 takes it, has no notice of any infirmity therein. (Sec. 3060-
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CANCELLATION OF INSTRUMENTS Continued to

CONSPIRACY

the grantees took no part in the fraud, duress or undue influence. *Wilson v. Calhoun*, 111.

Delay in action to set aside: Laches. One must, of course, move
2 with promptness to set aside his deed on the ground of fraud, but a delay of some eight months in instant case did not render plaintiff guilty of laches. *Wilson v. Calhoun*, 111.

CERTIORARI.

PROCEEDINGS AND DETERMINATION.

Return: Supplementary testimony: Purpose for which admissible: Highways. Certiorari does not act as an appeal wherein cases may be tried *de novo*, but testimony beyond the return, though not offered before the lower tribunal, may, on the hearing, supplement the return, but such testimony must bear on the one narrow question, to wit: Did the lower tribunal act in excess of its jurisdiction or otherwise illegally? *Hatch v. Board*, 82.

CITIES AND TOWNS. See **MUNICIPAL CORPORATIONS.**

COMPROMISE AND SETTLEMENT.

CONSIDERATION.

Payment in advance: Unliquidated claims. The payment of a
1 liquidated claim (rent notes) before maturity may be a sufficient consideration for the satisfaction of unliquidated claims pending between the parties. *Bice v. Siver*, 255.

EVIDENCE.

Facts showing: Evidence reviewed. Evidence reviewed and held
2 insufficient to establish, *prima facie*, a compromise settlement. *Bice v. Siver*, 255.

CONSIDERATION. See **COMPROMISE AND SETTLEMENT**, 1;
FRAUDULENT CONVEYANCES, 2; **RELEASE**, 1; **WATERS AND WATERCOURSES**, 6.

CONSPIRACY. See **CRIMINAL LAW**, 1; **INDICTMENT AND INFORMATION**, 2, 4.

EVIDENCE.

Overt acts: Conviction for. Of course, an accused on trial for
1 conspiracy to commit arson cannot be convicted of arson,

CONSPIRACY Continued TO CONTRACTS
 though such arson may be shown to establish the conspiracy.
 State v. Madden, 230.

Sufficiency: Facts reviewed. Evidence reviewed and held to sus-
 2 tain conviction for conspiracy to commit arson. State v.
 Madden, 230.

TRIAL—INSTRUCTIONS.

Declarations and acts of co-conspirators: Limitations: Instruc-
 3 tions as a whole. It is neither fair nor permissible to con-
 strue each and every instruction as though it were the only
 one given. An instruction largely explanatory as to the "man-
 ner" of proving a conspiracy, but possibly subject to the ob-
 jection that it did not limit declarations and acts of co-con-
 spirators to those made at the time of the formation of the
 conspiracy and up to its consummation, was fully cured by
 other instructions properly stating such limitation. State v.
 Madden, 230.

CONTINUANCE.

DISCRETION OF COURT.

Opportunity to prove immaterial issue. It is not error to deny
 1 a motion for a continuance in order to prove an immaterial
 matter; for instance, to enable defendant, in a mortgage
 foreclosure, to prove that the plaintiff was only the equitable
 owner of the note. Benjamin v. Petersen, 461.

CONTRACTS. See EVIDENCE, 5; SALES.

EVIDENCE OF.

Signing: Conflict of evidence: Record not showing. Where the
 1 signing of a certain letter was material to defendant's lia-
 bility on his former contract, held that the record presented
 no conflict as to defendant's signature, one witness testify-
 ing that he saw defendant sign said letter, defendant testi-
 fying that the signature looked like his signature, but he had
 no remembrance of signing it. Mausoleum Co. v. Wright,
 546.

CONSTRUCTION AND OPERATION.

Landlord and tenant: Lease: "General expressions followed by
 2 special enumeration": When general rule nonapplicable.
 The rule of construction that "a general word or clause fol-

CONTRACTS Continued

TO

COSTS

lowed by other words of specific or particular enumeration ordinarily includes no more than the things specifically mentioned" has no application (a) when the writing fairly demonstrates that such was not the intention of the parties, (b) when the application of the rule works absurd results, or (c) when the general expression and the particular enumeration can both be given force and effect without inconsistency. *Verbeck v. Peters*, 610.

Broker's commission: "Consummation" of deal: Jury question.

- 3 The use of words and phrases in such connection that reasonable minds may well differ as to the sense in which they are used precludes the court from declaring their meaning as a matter of law. In a case wherein a real estate broker's commission was due "on the consummation of said deal," *held* that defendant could not justly complain that the court directed the jury to determine the sense in which the words were used. *Ball v. Davenport*, 33.

Giving life to all facts. A construction of a contract that gives

- 4 due effect to all the facts will always be preferred to one which makes a part of the facts idle. In other words, a construction is to be avoided which accomplishes for a thing done no more than would exist without the doing of that thing. So *held* under conflicting claims as to when a broker's commission was due under the contract. *Ball v. Davenport*, 33.

RESCISSIION AND ABANDONMENT.

Repudiation: Repentance. One who enters into a written con-

- 5 tract, subsequently repudiates the same, and still later enters into negotiations with the other party and insists on certain changes, which are granted, and the contract completed in accordance therewith, has no defense to the entire contract price—can no longer insist on his attempted repudiation. *Mausoleum Co. v. Wright*, 546.

PERFORMANCE.

Difficulty attending performance: Excuse. Inconvenience and

- 6 difficulty attending the performance of the terms of a contract are no excuse for nonperformance. *Bice v. Siver*, 255.

COSTS. See **BASTARDS**, 2.

CRIMINAL LAW

CRIMINAL LAW. See ASSAULT AND BATTERY; CONSPIRACY; INDICTMENT AND INFORMATION; JURY, 3, 4; LARCENY, 1; PROSTITUTION, HOUSE OF; RAPE; SEDUCTION.

PARTIES—ACCESSORIES.

Conspiracy: Approval and inaction only. It is correct for the
1 court to charge that defendant may be convicted though he did not actually participate in the consummation of the offense charged, provided it be shown beyond a reasonable doubt by proof, direct or circumstantial, that the offense was consummated by others in pursuance of a conspiracy in which defendant was a party. It is reversible error for the court to refuse to amplify such instruction, when requested by the defendant, by clearly embodying the thought that defendant cannot properly be convicted from the mere fact that he witnessed the unlawful acts, even approved of them, remained silent, and made no effort to stop them. *State v. Bosworth*, 329.

CHANGE OF VENUE.

Assignment for trial in other county: Effect of order. A valid
2 order made by the district court of the county to which a criminal cause had been sent on change of venue, assigning said cause for trial on a certain date, is in no wise affected by the fact that the court of the other county, in ordering the change of venue, also entered an order that the cause be tried on the same date. *State v. Giudice*, 731.

EVIDENCE—CORPORATE EXISTENCE.

De facto existence: Proof: Insufficiency. Testimony that cars
3 were being operated by the "Oskaloosa Traction & Light Company," and loose statements disclosing the existence of trolleys, trolley wires, electric power houses, etc., do not establish the existence of a *de facto* corporation or the ownership of any property. *State v. Bosworth*, 329.

EVIDENCE—IDENTITY OF ACCUSED.

Homicide: Range of cross-examination. Questions tending to
3a rebut, impeach, modify, explain or in some way qualify the statements made on direct examination constitute legitimate cross-examination. *State v. Giudice*, 731.

CRIMINAL LAW Continued

EVIDENCE—CONDUCT AND Demeanor OF Accused.

Subsequent demeanor of accused: Admissibility. Defendant's
4 actions and demeanor immediately after the commission of an offense are a legitimate subject of inquiry; for instance, that, on being informed of the death of the deceased, he hurriedly dressed and left his stopping place. *State v. Giudice*, 731.

Flight in absence of accusation—Effect of—Instructions. The
5 effect of flight, if the jury found any, on the part of accused, was properly left to the jury, even though at the time of leaving accused had not been charged with the offense. *State v. Robinson*, 267.

EVIDENCE—RES GESTAE.

Res gestae, doctrine applied. *Res gestae*, a frequent test, "were
6 the facts talking through the party, or the party talking about the facts?" *State v. Giudice*, 731.

Admissibility: Rape. Evidence of offenses other and different
7 than the specific one charged in the indictment, and each a complete offense in itself, is admissible on the question of *quo animo*, even though such offenses were not directly committed by the accused, and though subsequent in point of time to the offense charged, when in view of time, place, and circumstances the offense charged and such other offenses are so interwoven that they all constitute one criminal transaction. *State v. Robinson*, 267.

EVIDENCE—GOOD CHARACTER.

Effect on question of guilt. The law makes no attempt to specify
8 just what effect, as a matter of law, shall be given to evidence of previous good character, but leaves its value as defensive evidence in any given case to be determined by the jury. Therefore a requested instruction to the effect that such evidence is sufficient to overcome the evidence of guilt, where the evidence is not convincing and of such a nature as to exclude a reasonable doubt of his innocence, is properly refused. *State v. Bosworth*, 329.

EVIDENCE—DEMONSTRATIVE.

Homicide: Exhibits connected with offense charged: Proper
8a Identification. Evidence reviewed and held to show such con-

CRIMINAL LAW Continued

nection as to justify the admission of a razor and bloody pillow slip. *State v. Giudice*, 731.

EVIDENCE—OPINION.

Manner of Inflicting wound. A physician who has personal knowledge of the nature of the wound inflicted on deceased, there being no eyewitnesses, may testify that such wound could, in his opinion, have been inflicted by a certain instrument used in a certain manner,—for instance, by a razor held in the hands of a person standing behind the deceased. *State v. Giudice*, 731.

TRIAL—COURSE AND CONDUCT.

Witnesses: Examination: Objections by different associated counsel: Statute. It is not improper for more than one counsel to enter objections to proceedings. Sec. 3700, Code 1897, requiring that but one counsel on each side shall examine the same witness, has no application to the making of objections. *State v. Giudice*, 731.

TRIAL—ARGUMENT AND CONDUCT OF COUNSEL.

Misconduct of prosecutor: Sufficiency of showing. Misconduct of 10 the prosecutor in argument must be made to appear. The court will not presume it. *State v. Vochocki*, 246.

Inflammatory appeals: New trial. The law does not shackle a 11 public prosecutor with a handicap in the way of a hard and fast rule as to just what he may and just what he may not say in argument. But however repulsive the crime may be, however self-evident the guilt of the accused may appear, the public prosecutor should always remember that to keep within the record and fair and reasonable deductions therefrom is the high ideal of the law and his proudest boast. Aside from this high ideal of the law, he should remember that assertions during argument that he or someone else would have been justified in taking the law into his own hands and killing the accused (or words to that effect) are regarded as highly inflammatory and are very destructive to the stability of a verdict of guilt. In the instant case, a new trial was ordered, because of inflammatory remarks, in spite of the admonition of the trial court to the jury not to consider the same. *State v. Robinson*, 267.

CRIMINAL LAW Continued

Prejudicial argument. The object of a change of venue is to avoid
 12 prejudice and thus assure to the accused an absolutely fair
 and impartial trial, and the county attorney who, in the trial
 of the cause, attempts to restore prejudice against the accused
 by parading before the jury the fact that the accused has
 taken a change of venue, falls far short of the high ideals and
 spirit of fairness which ought to characterize a public prosecu-
 tor. It is misconduct, though not necessarily prejudicial.
 State v. Giudice, 731.

Argument aside record: Prejudice. Counsel for the state must
 13 keep within the record. The prompt granting of a new trial
 is the penalty, under the record, for bitterly assailing the
 accused, during argument, for offenses and lecherous and scan-
 dalous conduct of which the record was barren of evidence.
 State v. Giudice, 731.

**Questionable conduct—Severe characterization by opposing coun-
 14 sel: Effect.** The law is partial to the truth. If counsel's
 conduct during the progress of the trial is very largely a mat-
 ter of "hot air," it is not reversible error for the opposing
 counsel to so characterize it. State v. Giudice, 731.

Waiver: General exception. Objection to an improper argument
 15 should, it is true, be made when the argument is made, or a
 waiver of the objection will result, but this rule is sufficiently
 complied with when, in order to avoid interruptions, it was
 agreed that the accused should have an exception to all parts
 of the opposing argument. State v. Giudice, 731.

Trial: Reference to failure of co-defendant to testify. A refer-
 15a erence in argument to the failure of a co-defendant, not on
 trial, to testify, is permissible. State v. Madden, 230.

INSTRUCTIONS—REQUISITES AND SUFFICIENCY.

Defining terms—Necessity for: "Remove." It is not necessary
 16 for the court to define the word "remove." So held under a
 charge of maliciously removing a street car. (Sec. 4807, Sup.
 Code, 1913.) State v. Bosworth, 329.

Alibi: Erroneous application. Alibi implies a claim on the part
 17 of the accused that at the time of the commission of the
 offense in question he was at some other place and so far dis-
 tant that he could not have committed it. Applying the doc-
 trine over the objection of the accused, with the usual caution

CRIMINAL LAW Continued

that it should be closely scanned because easily manufactured, to a state of evidence wherein the accused admitted that he was within twenty-five feet of the place where and when the act charged was committed, but denied all participation therein, constitutes reversible error, because (a) without basis in the evidence, (b) misleading the jury to infer that the sole defense of the accused was that he was so far away that he could not have reached the place in question, (c) disparaging and discrediting the entire evidence bearing on his nonparticipation in the act charged, and (d) practically throwing the burden of proof of innocence on the accused. *State v. Bosworth*, 329.

ALIBI: Consenting to improper application. The mere fact that
18 the accused accounts for his whereabouts up to a time shortly before the commission of the offense charged furnishes no basis for injecting the issue of alibi into the case, when the accused admits that he was within 25 feet of the place where and when the act charged was committed but denies all participation therein. *State v. Bosworth*, 329.

TRIAL—CONFINEMENT OF JURY.

Jury: Objection to separation during trial: Duty of court and
18a counsel. It is the duty of the court in a criminal cause to take the *full responsibility* for ordering the jury kept together, on request of either party. It is equally the duty of counsel not to parade before the jury the fact that *he* is perfectly willing that the jury separate, thereby throwing upon the other party the odium of having requested the order. Violation of this duty *held* nonreversible error because the objection to the separation of the jury was withdrawn. *State v. Giudice*, 731.

TRIAL—CONDUCT OF JURY.

Misconduct of jurymen during deliberations: Detailing matters
19 outside of evidence. A verdict will not be overthrown by the fact that, during the deliberations of the jury in the trial of a criminal cause, one of the jurors stated that the defendant "looked like" a party who some years prior thereto obtained a small sum of money from him by a sharp scheme. *State v. Rand*, 25.

VERDICT—INCLUDED OFFENSE.

Conviction of offense less than justified. If evidence would justify
20 a verdict of guilt of assault with intent to kill, defendant

CRIMINAL LAW Continued **TO** **DAMAGES**
cannot complain that the jury returned a verdict of assault with intent to do great bodily harm. *State v. Cessna*, 726.

Rape: Issues. The submission of included offenses, which might 30a have been omitted, can seldom be prejudicial to defendant. *State v. Vochocki*, 246.

NEW TRIAL. (See 11-14, 15a, 17, 18a, 19 above.)

APPEAL—PRESERVING EXCEPTIONS.

Reception of evidence: Failure to object: When Considered on 21 appeal. Where an error has not been sufficiently excepted to in a criminal case and there is to be a retrial because of other errors, the error insufficiently excepted to will be considered on appeal for the purpose of directing the proper course on retrial. *State v. Bosworth*, 329.

APPEAL—BURDEN OF SHOWING ERROR.

Trial: Witnesses: Excluding answer: Necessity for error to ap- 22 pear. When a witness is prevented, on objection, from answering, counsel should, by some proper offer or record, show what he intends to establish. Conjecture as to what the answer might be will not justify a reversal. *State v. Madden*, 230.

CUSTODIA LEGIS. See ATTACHMENT, 1.

DAMAGES. See DEEDS, 2; NUISANCE, 2; TRIAL (VERDICT).

SPECULATIVE DAMAGES.

Personal injury: Instructions permitting speculation: Future 1 pain. Whether an instruction permitting a recovery for such "pain and suffering as plaintiff *may* endure in the future" escapes the vice of opening the door to mere speculation by the limitations (a) "as shown by the evidence," (b) "if any he will suffer in the future," and (c) "all as established by the evidence," *quære*. *Woodworth v. Ry. Co.*, 697.

Personal injury: Instruction permitting speculation: Future Suf- 2 fering: Hopelessly permanent injuries. An instruction, if faulty because opening the door to mere speculation, in that it allowed a recovery for such future suffering as "may" be sustained in the future, is rendered unobjectionable by the fact that plaintiff's injuries were *hopelessly permanent*. *Woodworth v. Ry. Co.*, 697.

DAMAGES Continued

to

DEEDS

Future or continuing injury: Right to recover: Instruction not
 3 authorizing. Instruction reviewed and held not to authorize
 recovery for future or continuing injury. *Pettermann v.*
City, 555.

MEASURE OF DAMAGES.

Injury to property: Cost of repairs: Reasonable value thereof.

4 Cost of repairs is not the measure of recovery for a wrongful
 injury to property. Such cost must be shown to be the reason-
 able value of the repairs, especially when there is no evidence
 as to the nature of the injury to the property. *Zellmer v.*
McTaigue, 534.

DECEASED, TRANSACTIONS WITH. See EVIDENCE, 3a.

DEEDS.

CONSTRUCTION AND OPERATION.

Deed without reservation following town plat dedication with

1 reservation. The dedication of a city plat (Sec. 914 *et seq.*,
 Code 1897), containing an express reservation of all minerals
 underlying the tract, does not, *ipso facto* and as a matter of
 law, work an entire separation of the original fee into two
 new and distinct fees, to wit, (1) a fee to the surface and
 (2) a fee to the minerals, in the sense that a *conclusive*
 presumption arises that an interest in the surface only is
 conveyed by subsequent conveyances of the lots by ordinary
 deeds without reservation of minerals. No such presumption
 will be indulged. "Intention" remains the all-important in-
 quiry, and such intention will be sought out from all the facts
 and attendant circumstances, and enforced either (a) from
 the language of the deed itself, if possible, or (b) by refor-
 mation where the parties have been mistaken as to the legal
 effect of the language used. Held that a deed in the ordinary
 general form, and without any reservation of minerals, to the
 lots of an addition dedicated with express reservation of all
 minerals, was intended to carry the entire interest in the lots
 and would be enforced accordingly. *Investment Co. v. Coal*
Co., 593.

Vendor and purchaser: Existing permanent nuisance: Damages:

2 Action by grantee. When damages occasioned to land by a
 nuisance are original, an ordinary warranty deed will not
 carry to the grantee in the deed the right to such damages.
Irvine v. City, 653.

DE FACTO

TO

DIVORCE

DE FACTO. See CRIMINAL LAW, 3.

DE NOVO. See CERTIORARI, 1.

DESCENT AND DISTRIBUTION. See HOMESTEAD, 1.

DIRECTION OF VERDICT. See TRIAL.

DISMISSAL AND NONSUIT.

POWER OF COURT TO ENTER.

Inherent power of court to enter: Failure to prosecute: Time:

- 1 Computation. An action may be dismissed for want of prosecution, under the inherent powers of the court. Assuming that notice of such contemplated action was necessary under a rule of court requiring ten days' publication of notice to precede the dismissal, *held*, notice published on June 10th, followed by an order of dismissal on June 20th, was sufficient because (a) furnishing ten days' notice by excluding date of publication and including date of dismissal (Sec. 48, Par. 23, Code 1897), and (b) if ten clear days were required by the rule, it was not a case of no notice but of defective notice only. *Railway Co. v. District Court*, 568.

DITCHES. See WATERS AND WATERCOURSES.

DIVORCE.

EVIDENCE—SUFFICIENCY.

Cruel and inhuman treatment: Insufficiency of evidence to establish.

- 1 *lish*. Evidence reviewed and held insufficient to justify a decree of divorce on the grounds of cruel and inhuman treatment. *Groves v. Groves*, 489.

PROPERTY RIGHTS.

Conveyance by wife before decree: Effect. A former husband

- 2 cannot, after his former wife has secured a divorce from him, complain that, while the marriage relation existed, his wife, having received a conveyance of land from a trustee who held the title in trust for her, altered the said deed by erasing her own name as grantee and inserted in lieu thereof the name of a person to whom she sold the land, the decree of divorce being silent as to the property rights of the parties. *Cooper v. Olson*, 141.

DIVORCE Continued

TO

EMINENT DOMAIN

CUSTODY OF CHILDREN.

Suspending order pending appeal. An order in divorce proceedings as to the custody of children may, on the same day when made, be suspended, pending an appeal from such order. The counter rule in habeas corpus proceedings has no application in divorce proceedings. *Scott v. Wheeler*, 99.

DRAINS. See **WATERS AND WATERCOURSES.****ASSESSMENT—INTEREST AND PENALTIES.**

Interest: From what date computed. Assessments of benefits for drainage improvements draw interest from the date of the original assessment by the board of supervisors, whether the amount is fixed by the board of supervisors or by the court on appeal. (Sec. 1989-a12, Sup. Code, 1913.) *Rystad v. District*, 178.

Penalties: When delinquent. Penalties for the nonpayment of assessments of benefits for the construction of drainage improvements are held in abeyance, pending an unsuccessful appeal on behalf of the drainage district to the Supreme Court from an order of the district court reducing the assessment made by the board of supervisors. (Sec. 1989-a26, Sup. Code, 1913.) *Rystad v. District*, 178.

DUPLICITY. See **INDICTMENT AND INFORMATION**, 2.**DURESS.** See **CANCELLATION OF INSTRUMENTS.****EASEMENTS.** See **WATERS AND WATERCOURSES**, 5, 6.**ELECTIONS.** See **HOMESTEAD**, 1; **SCHOOLS AND SCHOOL DISTRICTS**, 2-6.**EMINENT DOMAIN.****TITLE OR RIGHT ACQUIRED.**

Railway right of way: Abandonment of work: Reversion of title: Return of condemnation money. A railway right of way, acquired by condemnation proceedings, reverts to the owner from whose land such right of way was carved when the construction of the railway has "commenced," and such construction abandoned and not in good faith resumed for

Railway right of way: Statute of Limitation: "Commencement of construction." Sec. 2015, Code 1897, providing that if the construction of a railway has "commenced" and such construction ceases and is not in good faith resumed for eight years, the right of way acquired by condemnation shall revert to the owner of the land from which such right of way was taken, becomes operative from the time construction work commences *on any part of the contemplated line as a whole*. Such statute does not remain inoperative as to any particular tract simply because no construction work has been actually done on that particular tract. *Vandewater v. Ry. Co.*, 687.

"No eyewitness" rule: Contributory negligence: Presumption of 1 care. The full statement of the "no eyewitness" rule is:

EVIDENCE Continued

Where a party is dead and there is no eyewitness (and therefore no obtainable direct evidence) as to the manner in which he conducted himself *at and immediately preceding the time of an injury*, a presumption arises that he was exercising that care and caution that a man of ordinary prudence, judgment and discretion exercises, under like circumstances, and in relation to the same matter, unless the facts and circumstances shown upon the trial negative such presumption. *Merchants, etc., Co. v. Ry.*, 378.

RELEVANCY, MATERIALITY AND COMPETENCY.

Life tables: **Expectancy of life:** **Disputed permanent injury.** Life tables showing expectancy of life are admissible when the permanency of the injury is a fair question for the jury. *Blake v. City*, 128.

Exclusion: **Immaterial issue.** The exclusion of evidence as to who employed the attorney of record for plaintiff was not error, when the object sought was to show that plaintiff had pledged the note sued upon, such act of pledging being no defense to the action. *Benjamin v. Petersen*, 461.

Transactions with deceased: **Objections:** **Waiver.** A party objecting to testimony and a witness because incompetent under Sec. 4604, Code, as calling for personal communications on a certain point in issue with a party insane, waives such objection by adopting such testimony "as his own testimony," even though in such adoption he attempts to preserve his former objections. In other words, such party after making such a record will not be permitted to insist on the probative force of that part of such "communications" as is favorable to him on a particular issue, and to deny the probative force of that which militates against him on the same point in issue. He must take all or none. *Cooper v. Olson*, 141.

HEARSAY.

General rule applied. Hearsay evidence is incompetent to establish any specific fact which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. *Hatch v. Board*, 82.

PAROL AS AFFECTING WRITING.

"Parol evidence" rule: **Contracts partly written, partly oral:** When oral part provable. A contract may be partly in writing and partly in parol. If the parol part is concerning a mat-

EVIDENCE Continued

ter not covered by the writing, then, the written and parol parts being harmonious, the parol part may be shown along with the written. *Bice v. Siver*, 255.

OPINION EVIDENCE.

Opinion on value: Foundation for: Competency. Whether a witness is competent to give his opinion as to values is a matter quite largely in the discretion of the trial judge, the weight of the opinion to be judged of by the jury. *State v. Madden*, 230.

Value: Article bought of reputable firm: Competency of witness. Witness held competent to testify to the value of an axle for a truck, even though the axle in question was the only one he had ever bought, and he judged of its value from the fact that he bought it of a reputable firm dealing in such articles, and believed the price they charged was the reasonable value. *Davidson v. Ry. Co.*, 467.

Opinion: What is not: Whether two objects met. Whether two passing objects hit each other is a statement of fact by a witness in position to see, and not an opinion. *Zellmer v. Mc-Taigue*, 534.

Detail of facts: When not necessary. A physician who professes to speak *from his personal observation, examination and treatment* of a patient may properly express an opinion based thereon, without first detailing all that he has learned from his examination and treatment of the patient. The accuracy and reasonableness of his opinion, if questioned, may be tested on cross-examination. *Blake v. City*, 128.

Future disability: Expert opinion on probability: Reasonable certainty. A physician may testify as to *probable* future disability, even though the jury, as a finality, must meet the legal formula: "What future disabilities are *reasonably certain*?" *Manton v. Stevens*, 495.

Expert evidence on nonexpert question: Expert drawing only inference jury could draw: Effect. Expert inferences from certain assumed facts, being the only inferences which the jury could draw from such facts, if believed by the jury to be true, are, while erroneously received, nonprejudicial. *Woodworth v. Ry. Co.*, 697.

EVIDENCE Continued

TO

FRAUD

Conclusions: When Harmless: Detail of fact. The statement of
12 a conclusion by a witness is rendered harmless if, in connection therewith, the facts upon which the statement is based are detailed to the jury. *Blake v. City*, 128.

EX CONTRACTU. See ACTIONS.

EX DELICTO. See ACTIONS.

EXECUTORS AND ADMINISTRATORS.

ALLOWANCE OF CLAIMS.

Claims: Fraudulent allowance: Vacation of. The allowance,
1 even on formal hearing before the court, of claims against the estate of the dead, is subject to special and distinctive scrutiny for fraud and collusion. In re *Estate of Scholes*, 93.

FALSE IMPRISONMENT.

ACTS CONSTITUTING.

Mayors: Nonjudicial acts: Liability. Freedom from fear of personal actions for damages in arriving at judicial conclusions is the immunity extended to a judicial incumbent. But he must actually act as such. When he lays aside his robes, he becomes a private citizen, and liable as such. So held in an action against a mayor for false imprisonment. *Foft v. Hamilton*, 576.

FALSE REPRESENTATIONS. See SALES, 3.

FALSUS IN UNO, FALSUS IN OMNIBUS. See WITNESSES, 5.

FEDERAL EMPLOYERS' LIABILITY ACT. See MASTER AND SERVANT, 2.

FORFEITURES. See LANDLORD AND TENANT, 1.

FRAUD. See CANCELLATION OF INSTRUMENTS; EXECUTORS AND ADMINISTRATORS, 1.

ACTS CONSTITUTING.

Principal and agent: Individual promise by agent: Existing facts.
1 A principal cannot be held liable, in an action for false rep-

FRAUD Continued

TO

FRAUDULENT CONVEYANCES

representations, for the statements of his agent in the nature of promises as to what he, the agent, and others would individually do. This drops far short of the rule requiring an assertion of an existing fact. *Halligan v. Laundry Co.*, 582.

EVIDENCE.

Value of property: Damages: Reliance on representations: Evidence to rebut. In an action for damages for false representations in the sale of property (corporate stock) the defendant may show that the property was in fact worth more than the purchaser paid, because tending to show (a) that the purchaser was not damaged, (b) that no fraud poisoned the representations, and (c) that the purchaser did not rely on the representations. *Halligan v. Laundry Co.*, 582.

Corporate stock: Value: Bills receivable. In an action for damages for false representations in the sale of corporate stock, after negotiations had pended for six months, the defendant may very properly show the bills receivable of the corporation at the time of the sale, as bearing on the value of the stock. *Halligan v. Laundry Co.*, 582.

FRAUDS, STATUTE OF.

REQUISITES AND SUFFICIENCY OF WRITING.

Crypt in mausoleum: Documentary evidence. Assuming that the sale of a crypt in a mausoleum is a sale of real estate, *held* that the documentary writings sufficient to satisfy the statute of frauds were furnished (a) by the written contract, (b) by the written specifications, (c) by the written report of the engineers thereon, (d) by the written correspondence in reference thereto signed by the defendant, followed by the construction of the crypt in accordance with said specifications. *Mausoleum Co. v. Wright*, 546.

FRAUDULENT CONVEYANCES.

TRANSFERS INVALID.

Creditor taking conveyance: Good faith demanded. A creditor of an insolvent debtor may, if he acts in good faith, that is, *solely to protect himself*, take a conveyance from such debtor, even though he has full knowledge that the debtor is giving the conveyance in order to defeat some other creditor. But

FRAUDULENT CONVEYANCES**TO****GIFTS**

such good faith is the full limit of his right. He must remember that the law strikes hard at a fraudulent state of mind. If, while protecting himself by taking the conveyance, he intermingles the motive and intent to assist the debtor in his scheme to defeat the other creditor, he will find himself stripped of the protection which the law otherwise would accord to him. *Steinfort v. Langhout*, 422.

Adequate consideration: Effect when fraud shown. The fullest
2 and most adequate consideration paid will not save a conveyance from being declared fraudulent when made with the intent, on the part of both grantor and grantee, to defeat the creditors of grantor. Fraud poisons and taints every transaction. *Steinfort v. Langhout*, 422.

GAME.**PRIVATE RIGHT OF TAKING.**

Deer: Prohibition on killing: Constitutional right to protect
1 property. An owner of property may lawfully kill a deer if such killing is reasonably necessary in order to prevent substantial injury to the property of such owner, even though the statute (Sec. 2551-a, Sup. Code, 1913) prohibiting the killing of deer contains no such exception. The right to protect property is a constitutional right. *State v. Ward*, 185.

Deer: Title in state: Effect of statute. The statute (Sec.
2 2562-b to 2562-d, inclusive, Sup. Code, 1913) declaring the title to all wild game to be in the state and providing that the killing of any deer shall be under the authority of the state fish and game warden does not render unlawful the killing of a deer in order to prevent substantial injury to property, even though the consent of such warden to such killing was not obtained, the title of the state to the carcass being fully recognized by the defendant. *State v. Ward*, 185.

GENERAL DENIAL. See **APPEAL AND ERROR**, 2.

GIFTS.**EVIDENCE—SUFFICIENCY.**

Mental competency. Evidence reviewed and held sufficient to es-
1 tablish mental competency to make a gift, and the actual

Gifts Continued **TO** **HOMESTEAD**
 making of a gift, by an old man in urgent need of care, in favor of a relative furnishing such care. *Jackson v. Northrup*, 669.

HABITATION, DEFENSE OF. See **ASSAULT AND BATTERY**, 1.

HARMLESS ERROR. See **APPEAL AND ERROR**, 6-8; **EVIDENCE**, 12; **INDICTMENT AND INFORMATION**, 1.

HIGHWAYS.

ESTABLISHMENT—JURISDICTIONAL MATTERS.

"Written" consent: What constitutes. Sec. 1512, Code 1897, provides for the establishment of highways without the appointment of a commissioner "if the *written* consent of the owners of land to be used for that purpose is first filed in the auditor's office." To meet this statute, the owner's name must appear upon the petition. In other words, the petition must be so complete that the board of supervisors can determine therefrom that it has the *written* consent of such owners *without resorting to oral evidence*. *Hatch v. Board*, 82.

Consent petition: Ownership of land: Competency of evidence.

2 Where the record title to lands was in the wife, and it was sought to show that the husband who had signed the petition for a consent highway was in fact the owner, *held* improper, in the effort to show his ownership, to receive evidence that the husband had given in the land for assessment as the property of the wife, but stated that the real truth was that he was the owner, because (a) incompetent generally, (b) incompetent to show ownership, and (c) the proceeding being *certiorari*, involving whether the petition bore the signatures of the owners of land as required by statute, the court could not try out the question whether someone *other than the record owner* was the owner of such land. *Hatch v. Board*, 82.

HOMESTEAD.

RIGHT OF SURVIVING SPOUSE.

Distributive share or homestead: Presumption: Election to Over-

1 come. On the question whether a surviving spouse took (a) the absolute or distributive one-third right or (b) the home-

HOMESTEAD Continued **TO** **INDICTMENT AND INFORMATION**
 stead occupancy right, the presumption, in the absence of evidence, is that the survivor took the former. Hence arises the necessity of showing an *election* to take the homestead occupancy, in order to overthrow the presumption. If continued occupancy is relied on to show such election, it must be an occupancy not only consistent with this homestead right, but an occupancy maintained under and because of such right. *Held*, presumption not overthrown. *Bosworth v. Blaine*, 296.

HUSBAND AND WIFE. See **DIVORCE**, 2.

WIFE'S SEPARATE ESTATE.

Wrongful possession of property: Implied promise to return:

- 1 One purchasing claims against other. If the husband secures or takes possession of his wife's property without her knowledge or consent, the law raises the same implied promise to repay to her as it would were she a stranger to him. A wife may take and enforce a claim against her husband the same as she may against a stranger. *Miller v. Mercer*, 166.

Property of wife: Husband's dominion over: Estoppel. No estoppel can arise against a wife who has permitted her husband to exercise unrestrained dominion over her property when no creditor of the husband has relied thereon or been injured thereby. *Miller v. Mercer*, 166.

INCLUDED OFFENSES. See **CRIMINAL LAW**, 20, 20a; **RAPE**, 8.

INDEPENDENT CONTRACTOR. See **MASTER AND SERVANT**, 13, 14.

INDICTMENT AND INFORMATION. See **PROSTITUTION**, **HOUSE OF**, 3.

REQUISITES AND SUFFICIENCY.

Minutes of magistrate: Irregular taking: Motion to quash.

- 1 When an indictment is returned on minutes of testimony certified by the committing magistrate, such indictment is not rendered invalid, and the witnesses whose testimony is so certified are not rendered incompetent to testify on the trial by the fact that the shorthand reporter appointed by the magistrate (Sec. 5227, Code, 1897), in making his transcript

INDICTMENT AND INFORMATION Continued to

INSURANCE

of the testimony, in part used the transcript of a private party, which transcript the reporter compared and found correct, and which was correct as a matter of fact. Such act was irregular but not reversible error. State v. Rand, 25.

Duplicity: Conspiracy: Overt acts. An indictment is not tainted
2 with the vice of duplicity which charges a conspiracy: (a) to burn property and to commit arson, and (b) with intent to injure the insurers, even though the pleader unnecessarily proceeds to enumerate the different buildings burned in pursuance of the conspiracy, the defendant being put on trial and tried for conspiracy only. State v. Madden, 230.

Malicious injury to property: Essential allegations. An indictment for maliciously injuring or destroying an electrical apparatus under Sec. 4807, Sup. Code, 1913, should, among other essential allegations, allege (a) the particular apparatus injured, (b) that it was an electrical apparatus, (c) the ownership of said apparatus and (d), if the ownership is in a corporation, the fact of incorporation should be alleged. Proof must meet and sustain the allegations. Proof showing the existence of a corporation *de facto* is sufficient. State v. Bosworth, 329.

Conspiracy: Designating crime: Generally recognized name:

4 **Arson.** The meaning of the term "arson" has been much enlarged over its common law meaning and is now generally used to designate the malicious or wilful destruction of all buildings. (Secs. 4776-4780, Code.) The term may be so used in charging conspiracy. State v. Madden, 230.

ISSUE, PROOF AND VARIANCE.

Malicious "injury" or "destruction": Variance. Under a charge
5 of maliciously "removing and destroying" a street car (Sec. 4807, Sup. Code, 1913), a conviction cannot be supported on evidence of a mere "injury." State v. Bosworth, 329.

INSTRUCTIONS. See BASTARDS, 1; BROKERS, 1; CONSPIRACY, 3; CRIMINAL LAW, 1, 8, 16-18; DAMAGES, 1, 3; NEGLIGENCE, 9; RAILROADS, 3; RAPE, 5, 6; TRIAL.

INSURANCE.

CONTRACT IN GENERAL—VALIDITY.

Removal of property from state: Effect: Mutual policy. A policy
1 of insurance issued by a mutual insurance company,

INSURANCE Continued

organized under the laws of Iowa, on property situated in Iowa, is not rendered invalid because, in the ordinary use of the property, it is temporarily removed to another state where loss occurs, no provision to the contrary appearing in the statutes, by-laws or policy. *Winsor v. Assoc.*, 521.

FORFEITURE OF POLICY.

Mortgage on insured property: Knowledge of insurer: New
2 **mortgage for balance of same debt.** A policy of insurance issued with knowledge of an existing mortgage on the property is not rendered invalid by the subsequent execution of a new mortgage for a remaining balance of the same old debt. *Winsor v. Assoc.*, 521.

Location of property: Removal during ordinary use: Loss. In-
3 **surance on personal property follows and attaches thereto** wherever it goes in the ordinary and usual use of such property, unless the policy otherwise expressly or impliedly restricts the locality of the loss. *Winsor v. Assoc.*, 521.

ESTOPPEL, WAIVER, ETC.

Location of property: Policy issued under anticipated removal:
4 **Loss: Estoppel.** Notice and knowledge to the insurer at the time of the issuance of a policy of insurance that the property might, in its ordinary use, be removed temporarily to another state, followed by the acceptance of premiums, precludes the insurer from insisting on the invalidity of the policy by reason of such removal. *Winsor v. Assoc.*, 521.

Mortgage incumbrance: Knowledge of insurer: Levying assess-
5 **ments: Estoppel.** An insurance company issuing a policy and demanding and receiving assessments thereon, all with knowledge of the existence of a mortgage on the property, will not be permitted to question the validity of the policy by reason of such mortgage. *Winsor v. Assoc.*, 521.

ACTION—BURDEN OF PROOF.

Increasing hazard: Act not violative of policy: Burden of proof.
6 If the insured does some act *not violative* of the policy, the burden of proof is on the insurer to show that the hazard was increased. If the insured does something *violative* of the policy, the burden of proof is on him, the insured, to show that the hazard was not increased. *Winsor v. Assoc.*, 521.

INTERSTATE COMMERCE TO JUDGMENT
INTERSTATE COMMERCE. See MASTER AND SERVANT, 2.

INTOXICATING LIQUORS.

INJUNCTION—VIOLATION.

Sale of hard cider. Evidence reviewed and held to show that the
 1 sale of hard cider containing 4.6% alcohol rendered the seller
 guilty of contempt in violating an injunction against the sale
 of intoxicating liquors. *Halloran v. Hutchinson*, 493.

JOINDER OF ACTIONS. See ACTIONS.

JOINT ADVENTURES.

RIGHTS, DUTIES AND RESPONSIBILITIES.

Evidence reviewed. As preliminary to a question of fact, the
 1 rights, duties and responsibility of those embarking in joint
 adventures are stated generally, and thereupon evidence re-
 viewed and held insufficient to show that plaintiff and defend-
 ant ever entered into a joint adventure (or partnership) for
 the promotion and construction of a railway, and consequently
 there was no occasion for the court to consider what the
 duties would have been had such relationship existed. *Goss v.*
Lanin, 57.

JUDGMENT. See DIVORCE, 3.

OPENING OR VACATING.

Passing of term: Notice of proceeding to vacate: Necessity for.
 1 Power to set aside final judgments, *after the term at which*
rendered, must be exercised strictly in accordance with statu-
 tory regulations. (Secs. 4091-4099, Code 1897.) Notice of
 the proceeding to set aside, in the time, manner and form pro-
 vided by statute, is jurisdictional. *Railway Co. v. District*
Court, 568.

ADJUDICATION.

Failure to plead. An adjudication of a controversy cannot be
 2 predicated on a ruling on demurrer not made of record and
 not pleaded. *Majestic Co. v. Davis*, 5.

JURY

TO

JUSTICES OF THE PEACE

JURY. See CRIMINAL LAW, 18a.**SUMMONING, ATTENDANCE, ETC.**

During term time: Power of judge. The judge of the district
1 court may, during term time, order additional jurors to be
summoned. (Sec. 347, Code, 1897.) State v. Giudice, 731.

Temporary discharge: Power to compel return. Jurors, so long
2 as they have not been discharged, may be required to return
and sit in any case. It is wholly immaterial that the jurors
may have been temporarily relieved from duty and paid for
their services to date. State v. Giudice, 731.

COMPETENCY.

Race prejudice. Race prejudice does not, *ipso facto*, disqualify a
3 juror. The suggestion is offered that it will be more in har-
mony with the idea of absolute impartiality to select juries
with no unkind feelings toward the class to which defendant
belongs. State v. Giudice, 731.

Reading newspapers: Opinion: Bias. The formation of an opin-
4 ion from reading newspaper accounts of an alleged crime and
defendant's connection therewith does not, *ipso facto*, dis-
qualify a juror when he (a) has no acquaintance with the
defendant, (b) entertains no bias or prejudice, (c) has no per-
sonal knowledge of the facts and (d) is able to give and will
give defendant a fair trial. State v. Giudice, 731.

JUSTICES OF THE PEACE.**APPEAL—DECISIONS REVIEWABLE.**

Amount in controversy: How determined. An appeal from the
1 judgment of a justice of the peace does not lie unless the
amount in controversy exceeds \$25.00 (Sec. 4547, Code, 1897).
To determine this amount it is not permissible to add together
the amount claimed by plaintiff and the amount claimed by
defendant as a counterclaim. Morrow v. Bell, 17.

APPEAL—HOW PERFECTED.

Bonds: Failure to mark "filed." The act of (a) securing the ap-
2 proval of the justice of the peace of an appeal bond and (b)
leaving such bond with the justice are the two essentials in

JUSTICES OF THE PEACE Continued to **LIMITATION OF ACTIONS**
perfecting an appeal. The failure of the justice to formally
mark the bond "filed" in no wise affects the legal force of the
bond. *Brown v. Melloon*, 49.

APPEAL—BOND—VALIDITY.

Bonds on appeal: Sureties alone signing: Effect. Judicial bonds
3 signed by the sureties only are valid in the absence of a statute
to the contrary. (Sec. 4552, Code.) So held in the case of an
appeal bond in justice court. *Brown v. Melloon*, 49.

LACHES. See **CANCELLATION OF INSTRUMENTS**, 2.

LANDLORD AND TENANT. See **CONTRACTS**, 2.

FORFEITURE OF LEASE.

Duty of landlord: Right of tenant: Opportunity to Perform.

- 1 Optional rights of forfeiture are not favorites of the law. For instance, if a tenant does, or fails to do, some act which the landlord may, under his lease, either (1) forgive and ignore or (2) seize upon as the basis for a forfeiture, the landlord, to avail himself of the latter, must (a) promptly manifest his intention to demand the doing or the not doing of the particular act in question, and (b) by demand or notice give the tenant the opportunity to avoid the forfeiture if he can. *Rogers v. Teager*, 604.

LARCENY.

EVIDENCE—SUFFICIENCY.

Larceny from person. Evidence reviewed and held sufficient to
1 sustain a verdict of guilt of larceny from the person. *State v. Rand*, 25.

LAST CLEAR CHANCE. See **NEGLIGENCE**, 5.

LEASES. See **CONTRACTS**, 2; **LANDLORD AND TENANT**.

LIFE ESTATES. See **WILLS**.

LIFE TABLES. See **EVIDENCE**, 2.

LIMITATION OF ACTIONS. See **EMINENT DOMAIN**, 2;
ESTOPPEL, 1; **WATERS AND WATERCOURSES**, 5.

LIMITATION OF ACTIONS Continued TO
COMPUTATION OF PERIOD.

MASTER AND SERVANT

Expanding claim by amendment. An amendment to a petition, 1 "expanding or elaborating" the allegations of the petition already filed, sets up no new cause of action, rendering the claim subject to a plea of the statute of limitation. *Blake v. City*, 128.

MALICIOUS MISCHIEF. See CRIMINAL LAW, 3, 16; INDICTMENT AND INFORMATION, 3, 5.

MASTER AND SERVANT. See TRIAL (VERDICT).

THE RELATION—CREATION AND EXISTENCE.

Non-employing servant: Implied authority in emergency. An 1 emergency rendering impossible, without farther assistance, the full performance of the master's specially assigned work, may, of itself, arm the servant, to whom such work was assigned by the master, with implied authority to employ or accept assistance immediately and essentially necessary to fulfill the task assigned, and thereby clothe the one employed or assisting with the rights of a servant of the master, even though the one employing or accepting the service otherwise has no authority to employ anyone or accept any service on behalf of the master, and even though the one employed or assisting does so under such circumstances that he could recover no compensation therefor from the master. *Hitchcock v. Creamery Co.*, 352.

THE RELATION—STATUTORY REGULATION.

Federal Employers' Liability Act: Interstate Commerce: Use of 2 track. The Federal Employers' Liability Act authorizes an action thereunder only when both carrier and the employee are engaged in interstate commerce. *Held*, carrier was engaged in such commerce over the track in question, though such track was not fully completed. *Clark v. Ry. Co.*, 452.

PLACE FOR WORK.

Negligence: "Fellow-servant" and "safe-place-to-work" rules: 3 Application of. The "fellow-servant" and "safe-place-to-work" rules are bottomed on diametrically opposite premises: the former, that the master should not be held for the negligence of a fellow-servant because he could not reasonably

MASTER AND SERVANT Continued

anticipate or guard against it; the latter, that the master should be held for negligent conditions known to him and which he could reasonably guard against. *Hitchcock v. Creamery Co.*, 352.

Safe place to work: Sanding street car tracks: Negligence. A

4 master must furnish his servant a reasonably safe place in which to work and must keep it reasonably safe. *Held* a jury question whether the master had failed to meet its duty in this respect and was negligent by reason of not having sanded its tracks or equipped its cars with sanding devices, and thereby prevented an approaching car from sliding through a car barn door and injuring the servant working therein. *Doran v. Ry. Co.*, 614.

Safe place: Duty to keep safe: Surrounding work of master. A

5 safe place is not rendered legally unsafe by the negligence of a fellow servant. But the negligence of the master is a different matter. A safe place may be rendered unsafe by the act of the master in carrying on other work near by. The master must furnish a reasonably safe place. He must then keep it reasonably safe. *Manton v. Stevens*, 495.

WARNING AND INSTRUCTING SERVANT.

Safe place to work: Hidden dangers: Warning. The "safe-place-

6 to-work" rule is violated by a failure of the master to warn the servant of known, lurking, and hidden dangers. *Hitchcock v. Creamery Co.*, 352.

Operating train: Application of Brakes: Failure to Warn:

7 **Rules: Custom: Negligence.** Evidence and instructions briefly reviewed and held to present a jury question whether defendant was negligent in the manner in which the brakes were applied to a train, and whether warning of such application was required (a) by rule or (b) by custom. *Clark v. Ry. Co.*, 452.

FELLOW SERVANTS AND VICE PRINCIPALS.

Vice principal or fellow-servant: Non-delegable duties. Whoever

8 is in charge of the performance of a non-delegable duty of the master is a vice principal. *Hitchcock v. Creamery Co.*, 352.

Safe place: Duty to keep safe: Act of foreman: Vice principal.

9 When the *time* and *place* of doing certain work in one place

MASTER AND SERVANT Continued

vitality affects the safety of another place in which other servants are employed, the act of a foreman in directing such work to be done at a certain time and place is the act of the master. *Manton v. Stevens*, 495.

Concurrent negligence of fellow servant and master: Statement 10 of rule: **Instructions.** The following instruction is held to sufficiently and correctly state the Concurrent Negligence Rule: "If plaintiff was injured as a result of the negligence of said motorman alone and without any fault or negligence on the part of the defendant company, then plaintiff is not entitled to recover. . . . If, however, the motorman was negligent and the defendant was also negligent as alleged, and if plaintiff, without contributory negligence on his part, was injured as the direct and proximate result of the concurrent negligence of said motorman and defendant, then plaintiff is entitled to recover." *Doran v. Ry. Co.*, 614.

ASSUMPTION OF RISK.

Assumption of risk (a) incident to employment and (b) incident to
 11 **negligence: Distinction.** "Assumption of risk incident to employment" and "assumption of risk incident to defendant's negligence" are two vastly different matters; the former is not an "assumption of risk" in its true sense. The latter is. For a master to say "The servant assumed the risk incident to his employment" is simply another way of saying, "I deny that I was negligent." *Woodworth v. Ry. Co.*, 697.

"Assumption of risk act": Risk "incident to employment": Necess-
 12 **sity for instructions.** The "assumption of risk" abolished (except under the imminent danger clause) by Chap. 219, Acts 33d G. A. (Sec. 4999-a3, Sup. Code, 1913), is that risk is incident to the *negligence of the master*. The latter clause, viz., "this statute shall not be construed so as to include such risks as are incident to the *employment*," is precautionary only. In such sense, it is not superfluous, but if said clause was omitted, the above construction would be inevitable. No instruction need be given on the effect of this last clause in the absence of a request therefor. *Woodworth v. Ry. Co.*, 697.

INDEPENDENT CONTRACTOR.

Respondent superior: Independent contractor: Who is not. One
 13 hired by a landowner to grade a street under the direction of

MASTER AND SERVANT Continued **TO** **MUNICIPAL CORPORATIONS**
the owner's engineer, and at a certain price per yard, is not
an independent contractor. *Frisbee v. Land Co.*, 540.

Respondent superior: Independent contractor: Evidence. An
14 independent contractor, generally speaking, is one who, exer-
cising an independent employment, contracts to do a piece of
work according to his own methods, and without being sub-
ject to the control of his employer, except as to the result of
his work. *Held*, an employee was not an independent con-
tractor. *Manton v. Stevens*, 495.

ACTIONS—VERDICT.

Negligence: Personal injury: Contradictory statements: Evi-
15 **dence: Sufficiency.** Evidence reviewed and held sufficient to
support verdict for personal injuries, notwithstanding state-
ments by plaintiff alleged to be wholly inconsistent with his
testimony on the trial. *Woodworth v. Ry. Co.*, 697.

MORTGAGES. See **EVIDENCE**, 3.

RIGHT TO FORECLOSE.

Real party in interest: Pledgor. The pledgor of a promissory
1 note secured by mortgage may maintain foreclosure proceed-
ings. *Benjamin v. Petersen*, 461.

MUNICIPAL CORPORATIONS. See **APPEAL AND ERROR**,
5; **NEGLIGENCE**, 3.

SEVERANCE OF TERRITORY.

Wishes of People: Sanitary and police needs. In an application
1 for the severance of territory from an incorporated city or
town (Sec. 622 et seq., Code 1897), material considerations
are (a) the wishes of the people and the benefits, if any, en-
joyed by them by being within the incorporation, (b) whether
the purpose of holding the property within the incorporation
is solely to derive taxes thereon, and (c) whether the territory
is reasonably needed for the future growth of the city or town
and for sanitary and police purposes. *Held*, a refusal to sever
was justified. *Platt v. Town*, 509.

USE AND REGULATION OF PUBLIC PLACES.

Public streets: Use for private purpose: Permit or license:
2 **Revocability.** Licenses or permits to use portions of a public
street for private purposes are revocable, irrespective of the

MUNICIPAL CORPORATIONS Continued

necessity or convenience of the private party. A public street, the title to which is in the municipality, is held in trust for public uses only. *Callahan v. City*, 719.

Streets: Hitching posts: Ingress and egress to property: Nuisance. Hitching posts in public streets, while not a nuisance *per se*, may be such in fact. In instant case, *held*, hitching posts so placed as to interfere with the ingress and egress of parties to and from their private property were a nuisance and abatable by injunction. *Kent v. City*, 90.

POLICE POWER AND REGULATIONS.

Ordinance contravening policy of state: Validity. A municipality is but a creature of the state, with powers always subservient to the powers and policy of the state. It has no power to forbid or punish that which state law or state policy expressly or impliedly permits. *Town v. Lanz*, 437.

DEFECTS OR OBSTRUCTIONS IN STREETS, ETC.

Sidewalks: Second-hand material: Notice of defect. That a sidewalk was built of second-hand materials, such fact being known to members of the city council, is admissible on the question of notice. *Blake v. City*, 128.

Notice to committee. It is a matter of judicial knowledge that the duties of a city with reference to streets are ordinarily performed, to a great extent, by a committee having special charge of such streets. Therefore, the court did not err in stating to the jury that notice of a defect in a sidewalk brought home to such committee would be notice to the city, especially when at least one member of the committee was identified as having such notice. *Blake v. City*, 128.

Notice of Condition. When the work of constructing a new road across a public street has been in progress during several days in succession, a jury might well find that the city ought to have known of the resulting conditions and remedied the same. *Frisbee v. Land Co.*, 540.

Defect in sidewalk: Notice of: Evidence: Form of Question. In an action for personal injury by reason of a sidewalk being out of repair, a question, "How long would you say generally the sidewalk had been out of repair?" was held to clearly call for the condition of the walk at the place where plaintiff was

MUNICIPAL CORPORATIONS Continued to

NEGLIGENCE

injured and as not being objectionable as calling for the condition at other or remote points. *Pettermann v. City*, 555.

Defective sidewalks: Repairs subsequent to injury: For what
9 purpose admissible. Evidence that a walk was taken up and repaired after an injury may be admissible, not to show negligence on the part of the city, but, if material, to show that the walk at time of trial is not in the same condition as at the time of the injury. If admitted, and defendant desires the evidence to be so limited, it should so request the court. *Blake v. City*, 128.

CONSTRUCTION OF PUBLIC IMPROVEMENTS.

Good faith reliance on expert advice: Bridges. A city must exercise
10 reasonable care in building its bridges; in other words, it must avoid negligence. It is not required, however, to secure the impossible, i. e., absolute perfection of human wisdom in its servants and agents; therefore, if, in the building of a bridge, it secures the services of a competent and skilled engineer, and in good faith adopts his plans and builds accordingly, it performs its full duty to exercise reasonable care and is not liable for resulting damage, until time and experience have given it notice that the bridge is in fact insufficient. So held in case of a bridge which had, prior to the flood in question, proven of sufficient capacity to care for all waters. *Tackaberry v. Warehouse Co.*, 203.

Waters and watercourses: Bridges: Duty of authorities to anticipate floods: Negligence. The unreasonable is never required;
10a for instance, a city, in the construction of its bridges, is not required to anticipate and provide for unprecedented floods and debris carried thereby, which could not reasonably have been foreseen. *Tackaberry v. Warehouse Co.*, 203.

Adopting plans of engineer: Variation therefrom: Effect. A city
11 adopting in good faith the plans for a bridge drawn by a competent engineer is not deprived of the protection which the law extends to such commendable care by the fact that in building the bridge certain modifications or additions are made which in no wise contributed to the injury of which complaint is made. *Tackaberry v. Warehouse Co.*, 203.

NEGLIGENCE. See EVIDENCE, 1; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 5-11; RAILROADS, 2-5; TRIAL, 10, 14.

NEGLIGENCE Continued

PROXIMATE CAUSE.

Act of God: Concurring negligence. Negligence of man may so
1 intermingle with an act of God as to fix responsibility for
damages when but for such negligence the plea and proof of
an act of God would be a complete defense, but such negligence
must be proximate; that is, it must appear that the
injury would not have happened but for such negligence.
Held, the principle had no application because negligence was
not shown. *Tackaberry v. Warehouse Co.*, 203.

Act of God: Unprecedented floods. An unprecedented flood may
2 constitute an "act of God" as that term is used in law. Evidence
reviewed and held to show that the flood in question
was, as a matter of law, unprecedented and therefore an act
of God. *Tackaberry v. Warehouse Co.*, 203.

CONTRIBUTORY NEGLIGENCE.

Known defect in street: Attempt to pass over. Contributory
3 negligence *per se* will not be pronounced on the mere act of
passing over a *known* defect in a public street. The test is:
Did the traveler know or ought he to have known that it was
imprudent to so pass? Couched in other terms: As a reasonably
prudent person, did I believe and have a right to believe
that I could pass in safety? *Frisbee v. Land Co.*, 540; *Pettermann v. City*, 555.

Vehicle in known place of danger. Placing a vehicle in a public
4 street in position where it can be hit by a passing street car
is not necessarily contributory negligence. Evidence reviewed
and held to show that the driver was not negligent *per se*
in so placing his delivery truck. *Davidson v. Ry. Co.*, 467.

"Last clear chance": Instructions. An instruction that the jury
5 might find defendant negligent if he knew or in the exercise
of ordinary care ought to have known that plaintiff's truck
was in a place of danger in time to stop the car and avoid the
injury, and did not do so, is not a statement of the "last clear
chance" doctrine. *Davidson v. Ry. Co.*, 467.

EVIDENCE.

Notice of defects: Other similar defects. Evidence of defects,
6 similar to but at other places than the particular defects relied
on as constituting negligence, existing at different points

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throughout a large part of defendant's railway switching yards, but in the near vicinity of the place of accident, is admissible to show notice to defendant of the existence of the particular defect relied on as constituting negligence, especially where the cause was tried on the theory that evidence of "notice" was necessary. *Woodworth v. Ry. Co.*, 697.

Notice of defect: How proven. Notice to defendant of a defect

7 on which negligence is predicated may be shown by plaintiff, both in the form of (1) actual knowledge to defendant of such defect and (2) constructively—that is, from the nature of the defect—defendant not having the legal right to dictate the *quantum* of proof which plaintiff shall offer in support of a fact in issue. *Woodworth v. Ry. Co.*, 697.

Failure to stop car: Speed of car. Under an assignment of negli-

8 gence in that defendant negligently failed to stop its car and avoid the injury, evidence as to the *speed* of the car is admissible, even though the speed of the car was not specifically assigned as negligence. *Davidson v. Ry. Co.*, 467.

INSTRUCTIONS.

Recovery without negligence: Instruction not authorizing. In-

9 struction, in instant case, reviewed and held not to authorize a recovery without proving negligence on part of defendant or to recover damages other than those pleaded. *Blake v. City*, 128.

VERDICT AND FINDINGS.

When finding not disturbed on appeal. Defendant's negligence hav-

10 ing been found by the jury, such finding will not be disturbed on appeal if the evidence, when given its most favorable construction in plaintiff's behalf, affords any reasonable or substantial support therefor. Evidence reviewed and held to support the jury's finding that a street railway, in running its car around a street corner and into a vehicle was negligent. *Davidson v. Ry. Co.*, 467.

NEGOTIABLE INSTRUMENTS. See **BILLS AND NOTES.**

NEW TRIAL. See **CRIMINAL LAW.**

NUISANCE TO **PLEADING**
NUISANCE. See **DEEDS**, 2; **MUNICIPAL CORPORATIONS**, 3.

ABATEMENT.

Estoppel. Where plaintiff actively promoted and advised the erection by a city of a permanent dam across a creek in order to form a lake in the city park, intending and knowing that certain lands would be permanently submerged, and damages, original in their nature, were thereby caused to a landowner by the overflow, he (plaintiff) will not be permitted, after buying said land, to abate said nuisance or to treat the same as a continuing nuisance, except as to damages independent of those proximately following the construction of said dam. *Irvine v. City*, 653.

ACTION FOR DAMAGES.

Damages: When original: When continuing: Right to elect.
2 When a nuisance is permanent in its construction, and fixed, determinable and permanent damages at once result from the very nature of such construction, the damages are original, that is, all damages, present and prospective, accrue at once. *Irvine v. City*, 653.

ORIGINAL NOTICE. See **PROCESS**.

OVERT ACTS. See **CONSPIRACY**, 1.

PARENT AND CHILD. See **ADOPTION**.

PARTNERSHIP. See **JOINT ADVENTURES**, 1.

PLEADING. See **JUDGMENT**, 2; **LIMITATION OF ACTIONS**, 1; **NEGLIGENCE**, 8.

CONSTRUCTION.

Ambiguity. An ambiguous pleading will be construed against the
1 pleader. *Woodworth v. Ry. Co.*, 697.

MATTERS SPECIALLY PLEADED.

Conversion: Evidence of gift as defense. A litigant need not
2 allege the negative of a proposition in order to introduce evidence bearing thereon, when the affirmative of the proposi-

PLEADING Continued TO PRIVACY OF CONTRACT
tion has been alleged and must be established by the adverse
litigant. Jackson v. Northrup, 669.

DEMURRER.

Answer containing general denial. A demurrer will not lie to an
3 answer containing a general denial. Majestic Co. v. Davis, 5.

ISSUE, PROOF AND VARIANCE.

Relief asked: Quantum of proof required: Fraud and conspiracy.

4 The quantum of proof required is only such as is necessary to
entitle plaintiff to the relief asked. So held where plaintiff
pleaded (a) fraudulent representations and (b) conspiracy to
defraud, and proved the former only. Shelberg v. Jones, 19.

Allegation: Proof: Variance: Oral contract: Written adoption.

5 Proof must correspond to allegation. Rule held not violated
by (a) declaring on an oral contract and (b) on the trial
reinforcing the claim by showing a subsequent written adop-
tion of such oral contract. Ball v. Davenport, 33.

PRESUMPTIONS. See APPEAL AND ERROR, 2; BILLS AND
NOTES, 1, 2; EVIDENCE, 1; HOMESTEAD, 1.

PRINCIPAL AND AGENT.

UNAUTHORIZED ACT OF AGENT.

"Ratification by accepting benefits": Nonapplicability of principle:

1 Collateral holder. One who holds property as collateral securi-
ty does not, on the theory of ratification by accepting benefits,
become responsible for the unauthorized false representations
of the real owner in effecting a sale of the property *for his*
(the real owner's) *own benefit*, simply because such collateral
holder receives the purchase price of the property and applies
it on the debt due him from the real owner. The principle
"that the *real beneficiary* of an unauthorized transaction, by
accepting the benefits thereof, adopts as his own the rascality
employed in consummating it" has no application to such
collateral holder, receiving and applying the proceeds of the
sale, unless the sale was in reality *for his own benefit*. Halli-
gan v. Laundry Co., 582.

PRIVACY OF CONTRACT. See RAILROADS, 1.

PROCESS

TO

RAILROADS

PROCESS.**SERVICE PROCURED BY FRAUD.**

Jurisdiction. Service of process secured through the trickery, deceit or fraud of a party or those acting for him, does not give the court jurisdiction. Record reviewed and held to show that jurisdiction attached—that no fraud had been practiced. *Crandall v. Trowbridge*, 155.

PROPERTY, DEFENSE OF. See *GAME*, 1.**PROSTITUTION, HOUSE OF.****NATURE AND ELEMENTS OF OFFENSE.**

Resorting to: Intent: Gist of offense. The gist of the offense of
 1 *resorting to a house of ill fame for the purpose of lewdness*, within the meaning of Sec. 4943, Code 1897, is the *purpose* or *intent* in so resorting. The offense may be complete without the occurrence of any specific acts of lewdness. *State v. Rayburn*, 514.

"Resorting to for lewdness": Who may be guilty: Male person.
 2 A male person may be guilty of resorting to a house of ill fame for the purpose of lewdness, within the meaning of Sec. 4943, Code 1897. Said section punishes both the acts of resorting to a house of ill fame (a) "for the purpose of prostitution" and (b) "for the purpose of lewdness." "Prostitution" and "lewdness" are not synonymous terms within the meaning of said section. *State v. Rayburn*, 514.

INDICTMENT.

Resorting to: Indictment: Sufficiency. An indictment for re-
 3 sorting to a house of ill fame for the purpose of lewdness, under Sec. 4943, Code 1897, need not allege the various acts which the defendant purposed committing. *State v. Rayburn*, 514.

RAILROADS.**SALE OF RAILROAD.**

Grantee assuming liability: Privity of contract: Fraud on cred-
 1 *itors.* The absolute assumption by a grantee of the payment

RAILROADS Continued

of all the existing liabilities of a grantor, and the agreement by such grantee to indemnify and hold grantor harmless from any such liabilities, in consideration of the transfer to grantee of all the assets of the grantor, creates something more than a mere "contract of indemnity" for grantor. By such assumption, the grantee puts himself, practically, into the shoes of grantor. Such a contract creates a right of action in favor of such creditors against grantee. This is true even though an attempt is made to limit the promise to pay and indemnify by a clause "that nothing in such contract shall be construed as giving any other person than grantee and grantor any right, remedy, or claim," as such latter clause, in so far as contradictory of the former clause, will be rejected as a fraud on grantor's creditors. So held where one railway company bought all the assets of another railway company. *Woodworth v. Ry. Co.*, 697.

ACCIDENTS AT CROSSINGS.

Absence of flagman. Negligence *per se* cannot be predicated on
 2 the absence of a flagman at a railroad crossing situated at or near the mouth of an alley one-half block long and closed except at the crossing. Whether such omission is negligence depends on the particular circumstances of each case. *Merchants, etc., Co. v. Ry.*, 378.

Care proportionate to danger: Sufficiency of instruction. The
 3 thought "that the care required on the part of those operating trains must bear some reasonable proportion to the known peculiar dangerous character of the particular crossing which they are approaching," is sufficiently embodied in an instruction (1) that it was defendant's duty not to be negligent, (2) that correctly defined negligence, and (3) directed the jury in determining the question of negligence to consider all the surrounding circumstances. *Merchants, etc., Co. v. Ry.*, 378.

Right of one to presuppose care by another. The right of the trav-
 4 eler, in approaching a railroad crossing, to assume that the railroad employees will exercise ordinary care in operating cars over the crossing is not a one-sided right. The railroad employees also have the right to assume that the traveler will exercise the same degree of care in approaching and going upon the crossing. *Merchants, etc., Co. v. Ry.*, 378.

EVIDENCE—RULES.

Rules governing employees: Admissibility. The "rules" of a rail-
 5 road company, adopted for the government of its employees,

REPLEVIN

TRIAL—QUESTIONS FOR JURY.

Right to possession: Necessity for payment or tender. In order to maintain an action of replevin, plaintiff must be entitled to the immediate possession of the property. If payment or tender is necessary in order to fix such right, then payment or tender of the correct amount must be made, even though de-

SALES Continued

TO SCHOOLS AND SCHOOL DISTRICTS

breached, does not give the buyer a right to return the animal for a disease not existing at the time of sale, but does give him the right to return for a disease existing when bought. *The buyer must shoulder the burden to so show.* If he is successful, then the flat refusal of the seller to receive back the horse is, of course, a waiver of the duty to return. *Bank v. Grigsby, 675.*

Waiver of conditions: Subsequent extension of contract: Effect.

- 5 The effect of the waiver of the conditions of a warranty, in the absence of fraud, is entirely nullified by a subsequent extension to a future date of the entire terms of the contract. *Bank v. Grigsby, 675.*

Breach: Failure of buyer to return: Waiver. When the buyer

- 6 of a stallion, warranted to be a sure breeder, was, under the conditions of warranty, required to accept another animal and return the first animal by a certain date, the statement of the seller, in response to a request from the buyer for another animal because the warranty on first one was breached, that he, the seller, had at that time no other animal to send, but would have others in the fall, would justify a finding that the seller waived the return, if the jury should find that the buyer could not in reason be expected to lose the service of the stallion for the entire season. *Bank v. Grigsby, 675.*

SCHOOLS AND SCHOOL DISTRICTS.

ATTACHING TERRITORY.

Adjoining district. Sec. 2791, Code 1897, authorizing territory to

- 1 be attached to a school district under certain conditions, is mandatory, in that any attempted annexation of territory, without the order of the county superintendent, is nugatory. *Townsend v. Garrett, 409.*

CONSOLIDATION OF DISTRICTS OR TERRITORY.

Petition: Assumed location of schoolhouse: Effect. A petition

- 2 for a consolidated school district (Sec. 2794-a, Sup. Code, 1913) is not rendered defective because it called for a certain specified location of the schoolhouse. Such a clause is neither required nor prohibited. *School District v. Martin, 262.*

Petition: Sufficiency. If a petition for a consolidated school dis-

- 3 trict requires the signed approval of the county superintendent

SCHOOLS AND SCHOOL DISTRICTS Continued to

SEDUCTION

ent to be affixed *after* being signed by the electors, such approval was sufficient where the superintendent had affixed his approval both before and after signing by the electors. (Sec. 2794-a, Sup. Code, 1913.) *School District v. Martin*, 262.

Notice of election: Sufficiency. Sec. 2746, Code 1897, does not
4 require the posting of five election notices in each of several independent school districts which it is proposed to consolidate. *Townsend v. Garrett*, 409.

Election: Notice: Computing time. The general rule for com-
5 puting time is to exclude the first day and include the last. (Sec. 48, Par. 23, Code.) Therefore, notice of a school election under Sec. 2746, Code, posted on March 18th for an election on March 28th, was sufficient, said statute requiring posting "for not less than ten days preceding the day of the meeting." *School District v. Martin*, 262.

Election: Separate vote in villages. A village ordinarily is a
6 collection or group of houses. A 60 and an 80-acre platted tract on which were located three and five widely separated houses, respectively, and a small store and a blacksmith shop, located at the junction of a public highway with an inter-urban railway, do not constitute "villages" within the meaning of Sec. 2794-a, Sup. Code, 1913, requiring separate voting in "villages" on the question of establishing a consolidated school district, nor within the meaning of Sec. 638 of the Code, providing that "town sites platted and unincorporated shall be known as villages." *School District v. Martin*, 262.

Size of remaining corporation: Prohibition. In the formation of
7 a consolidated independent school district, territory must not be so subtracted from a school corporation as to leave the corporation with less than four suitable, contiguous government sections (Sec. 2794-a, Sup. Code, 1913); yet this applies to the size of the corporation, not to the size of a part of the corporation,—for instance, not to the size of a subdistrict of a school district township. *School District v. Martin*, 262.

SEDUCTION.

UNCHASTITY OF PROSECUTRIX.

What Constitutes. Previous chastity of the female is an all-essen-
1 tial element of seduction. Without it there can be no seduction. To be chaste, such female must be pure in mind and

TAXATION

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TAXATION Continued **TRIAL**
TO
 banks and loan and trust companies, involve no discrimination against shareholders in national banks, and therefore no violation of said federal statute. An intention that government bonds shall be taxed when declared by law not to be taxable, or that stocks shall be twice taxed, is not imputable to any of our legislative bodies. *Head v. Board*, 300.

TENDER. See *REPLEVIN*, 1.

INSUFFICIENT TENDER.

Relief on appeal. While an insufficient tender will not be excused
 1 simply because the adversary makes an illegal and excessive demand, yet in a proper case the judgment on appeal will be so modified as to preserve the rights of one making an insufficient tender. *Rystad v. District*, 178.

TIME (COMPUTATION). See *DISMISSAL AND NONSUIT*, 1;
SCHOOLS AND SCHOOL DISTRICTS, 5.

TORT. See *ACTIONS*.

TRANSACTIONS WITH DECEASED. See *EVIDENCE*, 3a.

TRIAL. See *APPEAL AND ERROR*, 5; *BASTARDS*, 1, 2; *CONTINUANCE*.

RECEPTION OF EVIDENCE.

Natural incidents of case: Admissibility. Matters which are the
 1 natural incidents of a case are properly received. *State v. Hess*, 397.

Stereotyped objections: Hearsay. The d-agnet objection, "in-
 2 competent, irrelevant and immaterial," does not embrace the idea of "hearsay." *State v. Madden*, 230.

ARGUMENT AND CONDUCT OF COUNSEL.

Arguments based on complainant's evidence. A party cannot well
 3 complain of an argument based on evidence brought out by the complaining party himself on cross-examination or permitted to remain in the record without objection. *Pettermann v. City*, 555.

TRIAL Continued

DIRECTION OF VERDICT.

Motion: When treated in alternative. The suggestion is offered
4 that occasions may arise when the court will construe a motion demanding a directed verdict in favor of *both* of two defendants, as simply a demand in the alternative,—that is, that one or the other of the defendants be dismissed. *Manton v. Stevens*, 495.

Motion: Adverse ruling: Failure to renew motion: Waiver.
5 One who moves for directed verdict before the close of all the evidence, suffers an adverse ruling and fails to renew such motion after the close of *all* the evidence, thereby waives any error, if any, in such ruling. *Ball v. Davenport*, 33; *Pettermann v. City*, 555.

INSTRUCTIONS—PROVINCE OF COURT AND JURY.

Inapt instruction: Assumption of fact. The assumption of a fact
6 in issue is, of course, erroneous, but an inapt instruction, assuming that a certain fact has been established, may be cured by a subsequent instruction clearly stating the burden of proof as to such fact. *Manton v. Stevens*, 495.

INSTRUCTIONS—FORM, REQUISITES AND SUFFICIENCY.

Refusal of correct instruction: Duty of court. The better practice
7 is for the court to formulate its own instructions, even though the ones requested are correct. But if those asked and refused involve questions which ought to be submitted, then the court must give an instruction embodying the thought of the ones asked and refused. *Merchants, etc., Co. v. Ry.*, 378.

Incorrect instruction suggesting correct one on vital issue. An
8 incorrect requested instruction on a vital issue has the effect of calling the attention of the court to the point, thereby placing the court on its guard and necessitating a correct instruction on the point. *State v. Cessna*, 726.

Erroneous in part: Correct as a whole: Negligence. An instruction
9 which may have been objectionable as submitting the question of the negligence of a city in the original construction of the sidewalk, when no negligence in that respect was charged, is not error when the instruction, construed as a whole, obviates the objection. *Blake v. City*, 128.

TRIAL Continued

Stating grounds of negligence: Non-necessity to repeat. After
10 the court has once clearly stated the grounds of negligence upon which plaintiff's cause of action is predicated, it is not necessary to continue to repeat them in subsequent paragraphs. *Doran v. Ry. Co.*, 614.

Repetition of statements of law. The court need not and cannot
11 not in every sentence or in every paragraph attempt to restate all the law applicable to each phase of the controversy. It is sufficient if the law be stated with substantial accuracy in the instruction as a whole. *Blake v. City*, 128.

Stating affirmative and negative proposition: Sufficiency. The
12 reverse of an affirmative proposition need not necessarily be elaborated with the same fulness as was employed in stating the affirmative. For instance, the jury was sufficiently guided where it was told that if they found that the defendant street railway company should have sanded its tracks, in the exercise of reasonable care, and did not do so, and that the injury was the proximate result of such failure, and that the injured party was not negligent, then he could recover, "otherwise not." The two latter words, under the record in case at bar, and to a jurymen of common understanding, clearly suggest and state the reverse of the proposition immediately preceding. *Doran v. Ry. Co.*, 614.

Placing undue emphasis on certain evidence. Instructions should
13 not unduly emphasize certain evidence to the exclusion of other equally relevant evidence, but *held*, rule not violated. *Doran v. Ry. Co.*, 614.

Instruction inartificially drawn: Test to apply. An inartificially
14 or clumsily drawn instruction does not necessarily demand a reversal. Instructions must not be considered abstractly and apart from the record to which they are applied. The subject-matter must always be kept in mind. They are sufficient if, to a man of ordinary intelligence, a correct understanding of the law is given in the charge as a whole. Instruction reviewed, and *held* not to misdirect the jury as to what negligence would render the defendant liable.

DEEMER, C. J., and SALINGER, J., dissent as to the construction placed on the instruction in question. *Doran v. Ry. Co.*, 614.

Correct though inexplicit: Special instruction: Necessity for
15 **request: Waiver.** If an instruction is correct as given, though not as explicit as desired, request *must* be made for the more

TRIAL Continued

explicit instruction, or waiver will be the penalty. Woodworth v. Ry. Co., 697.

Quotient verdicts: Instructions against: Discretion of court. In-
16 structions cautioning the jury against "quotient" verdicts held unobjectionable. Zellmer v. McTaigue, 534.

INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Highways: Laws of the road: Instruction without support in
17 **evidence.** An instruction having no support in the evidence should not be given. So held with reference to a collision on the public highway. Zellmer v. McTaigue, 534.

Ignoring issues not met with proof: Duty of court. There is no
18 occasion to instruct on an issue as to which there is no evidence. So held where plaintiff pleaded (a) false representations and (b) conspiracy to defraud, but introduced no evidence of a conspiracy. Shelberg v. Jones, 19.

No evidence applicable: Who may complain. An instruction
19 should not be given unless there is evidence in the record to which it can be applied; but if an instruction be given in violation of this rule, a party who is thereby given an unwarranted chance for a verdict cannot complain. Ball v. Davenport, 33.

INSTRUCTIONS REQUESTED.

Instructions fundamentally erroneous: Necessity for request. The
20 error of the court in giving an instruction fundamentally wrong is not waived by the failure of the party injured thereby to ask a correct one. State v. Hess, 397.

Evidence admissible for limited purpose: Necessity for requested
21 **instruction.** When evidence is admissible for certain limited purposes only, he against whom the same is received must request an instruction so limiting or confining the jury in the consideration of such evidence, or the right will be waived. Shelberg v. Jones, 19.

INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS.

Failure to object before reading: Waiver. Failure to interpose a
22 objection to an instruction before the same is read to the jury works a waiver of the right to object. Pettermann v. City, 555.

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TO

WATERS AND WATERCOURSES

VERDICT—FORM.

Several defendants. In an action against several defendants, *held*,
23 the omission to submit separate forms of verdicts for each defendant could not have been prejudicial. *Shelberg v. Jones*, 19.

VERDICT—EXCESSIVENESS.

Damages: Permanent Injuries. A verdict of \$32,000 sustained.
24 Plaintiff lost both legs. At the time of the accident he was 26 years old. He had exclusively fitted himself for railroading, and was receiving \$111 per month when hurt. *Woodworth v. Ry. Co.*, 697.

TRUSTS.**RESULTING TRUSTS.**

Evidence: Insufficiency. Evidence reviewed and held insufficient
1 to establish a resulting trust. *Cooper v. Olson*, 141; *Jackson v. Northrup*, 689.

UNDUE INFLUENCE. See CANCELLATION OF INSTRUMENTS.

VENUE, CHANGE OF. See CRIMINAL LAW, 2.

WAIVER. See ACTIONS, 2, 3; APPEAL AND ERROR, 1, 4; CONTRACTS, 5; CRIMINAL LAW, 15; EVIDENCE, 3a; INSURANCE, 4, 5; SALES, 4-6; TRIAL, 5, 15, 20-22.

WARRANTY. See AUCTIONS AND AUCTIONEERS, 1.

WATERS AND WATERCOURSES. See MUNICIPAL CORPORATIONS, 10a.

NATURAL WATERCOURSES.

"Watercourse" defined. If the surface water in fact uniformly or
1 habitually flows off over a given course having reasonable limits in width, the line of its flow is, within the meaning of the law applicable to the discharge of surface water, a "watercourse." *Pascal v. Donahue*, 315.

Depressions: Right to tile: No presumption of increased flowage.
2 An owner of land may tile his land into natural watercourses

WATERS AND WATERCOURSES Continued

or depressions thereon (Sec. 1989-a53, Sup. Code, 1913), and no presumption will be indulged that such tiling either increased the flowage on the lower estate or cast water thereon in any different manner than formerly. Such facts must be made to affirmatively appear. *Pascal v. Donahue*, 315.

Drains: Increased flowage on servient estate. Drainage which
3 brings no *material* increase in flowage to the servient estate furnishes no ground for complaint. *Pascal v. Hynes*, 121.

Ditches: Right to restore normal condition. A landowner may,
4 in some cases, fill up a ditch on his premises to the extent of restoring the ground to its normal level, but if the landowner had such right, he was fully protected when the decree granted him the right to maintain his existing embankment provided he maintained the proper outlet through the same. *Pascal v. Donahue*, 315.

DRAINAGE EASEMENTS.

Agreed system of drainage: Statute of limitation. A drainage
5 system between the lands of different owners, constructed in the natural course of drainage by one of the landowners with the consent and acquiescence of the other, and continued and maintained for more than ten years to the mutual advantage of both of said owners, becomes a finality, an irrevocable easement which nothing will obliterate except an actual abandonment, as distinguished from an intention to abandon. *Pascal v. Hynes*, 121.

When easement revocable: Failure to repair. An easement in a
6 drainage system granted on a valuable consideration is not revocable at pleasure, even for a failure to repair as per agreement. The remedy for the complainant is to repair and demand recompense from the one holding the easement. *Pascal v. Hynes*, 121.

DECREE ADJUSTING RIGHTS.

Enjoining certain maintenance: Decree: Construction. The court,
7 in an action to enjoin the *raising* of a dam, decreed that defendant be enjoined "from maintaining any dam . . . other than the dam originally constructed . . . with flush boards . . . whereby . . . the water . . . shall be increased in height . . . in any manner . . . different than would be caused by said dam as originally constructed."

WORDS AND PHRASES Continued

"Prostitution" and "Lewdness." State v. Rayburn, 514.

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"Villages." District v. Martin, 263.

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